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# The New Corporate Migration

## TAX DIVERSION THROUGH INVERSION

Cathy Hwang<sup>†</sup>

### INTRODUCTION

Watson Pharmaceuticals was an American success story—until it became an Irish success story.

Taiwanese-American Allen Chao founded Watson in 1983, after cobbling together \$4 million in start-up funds from family, friends, and acquaintances.<sup>1</sup> Chao helmed Watson for a decade and a half. By the time he retired in 2007, Watson was the third-largest generic-pharmaceuticals manufacturer in the United States, with annual revenues of \$2.5 billion.<sup>2</sup> In 2012, Watson adopted the name Actavis for worldwide operations.<sup>3</sup> The following year, Actavis debuted in the Fortune 500.<sup>4</sup> At the

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<sup>1</sup> Damon Darlin, *Still Running Scared*, FORBES, Sept. 26, 1994, at 127-28 (describing Allen Chao's background and the founding of Watson Pharmaceuticals).

<sup>2</sup> Press Release, NexBio, Inc., Dr. Allen Chao, Founder & Former CEO of Watson Pharmaceuticals, Joins NexBio Board of Directors (Jan. 19, 2010), *available at* <http://www.prnewswire.com/news-releases/dr-allen-chao-founder-former-ceo-of-watson-pharmaceuticals-joins-nexbio-board-of-directors-82057617.html>.

<sup>3</sup> Press Release, Watson Pharm., Inc., Watson Announces New Name—Actavis—for Global Operations (Oct. 31, 2012), *available at* <http://phx.corporate-ir.net/phoenix.zhtml?c=65778&p=irol-newsArticle&ID=1752588> (announcing that Watson Pharmaceuticals, Inc. would adopt the Actavis name effective in 2013).

<sup>4</sup> *Actavis: What It's Like To Join The Fortune 500*, FORTUNE (May 10, 2013), <http://fortune.com/2013/05/10/actavis-what-its-like-to-join-the-fortune-500/> (reporting on an interview with Actavis CEO Paul Bisaro at the time Actavis joined the Fortune 500).

end of 2013, Actavis reported annual revenues of \$8.6 billion<sup>5</sup> and employed 19,200 people.<sup>6</sup>

In late 2013, Actavis acquired Ireland's Warner Chilcott plc.<sup>7</sup> In doing so, Actavis moved the jurisdiction of incorporation of its parent company to Ireland through a corporate inversion.<sup>8</sup> In a corporate inversion, a corporate group with a common parent incorporated in a domestic jurisdiction<sup>9</sup> reshuffles its corporate structure or acquires a foreign company in order to end up with a common parent incorporated in a lower-tax foreign jurisdiction. In Actavis's case, inverting from Nevada to Ireland was expected to lower its effective tax rate from 28% to approximately 17%.<sup>10</sup>

Corporate inversions are not new. U.S. oil and gas giant McDermott was the first to invert when, in 1982, it inverted to Panama by making one of its Panamanian subsidiaries the corporate group's parent company.<sup>11</sup> Since then, there have been about 75 inversions.<sup>12</sup> In 2014 alone, numerous domestic

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<sup>5</sup> Actavis plc, Annual Report (Form 10-K) 57 (Feb. 25, 2014) (disclosing that for the year ended December 31, 2013, Actavis plc had net revenues of \$8,677.6 million).

<sup>6</sup> *Id.* at 25 (disclosing that as of December 31, 2013, Actavis had approximately 19,200 employees).

<sup>7</sup> Actavis, Inc., Current Report (Form 8-K) (Oct. 1, 2013) (announcing the completion of the acquisition of Warner Chilcott plc, a public limited company organized under the laws of Ireland, by Actavis, Inc., which was, at the time of the announcement, a Nevada corporation. As a result of the transaction, both Actavis, Inc. and Warner Chilcott plc would become wholly owned indirect subsidiaries of a newly formed Irish company called Actavis plc).

<sup>8</sup> *Id.*

<sup>9</sup> The Tax Code classifies taxpayers as "domestic" (for corporations, this means a corporation incorporated in a U.S. jurisdiction) or "foreign." Thus, for the purposes of this article, corporations incorporated in U.S. jurisdictions are generally referred to as domestic corporations. See Classification of Taxpayers for U.S. Tax Purposes (May 28, 2014), available at <http://www.irs.gov/Individuals/International-Taxpayers/Classification-of-Taxpayers-for-U.S.-Tax-Purposes> (last accessed Mar. 8, 2015).

<sup>10</sup> Actavis Ltd., Amendment No. 1 to Registration Statement (Form S-4) 70 (Jul. 31, 2013) (disclosing that Actavis expected to lower its effective non-GAAP tax rate from approximately 28% to 17%).

<sup>11</sup> Hal Hicks, *Overview of Inversion Transactions: Selected Historical, Contemporary, and Transactional Perspectives*, 30 TAX NOTES INT'L 899, 903 (2003); see also *infra* notes 66-70 and accompanying text.

<sup>12</sup> Professor Mihir A. Desai at Harvard Law School has compiled the most comprehensive list of inversions to date, and his list includes approximately 75 inverted companies. See Colleen Walsh, *Getting a Handle on Inversion: A Q&A with Mihir Desai*, HARVARD L. TODAY (Aug. 15, 2014), <http://today.law.harvard.edu/harvard-gazette-mihir-desai-getting-handle-inversion> (click "these inversions" in Mihir Desai's first answer). This number comports with other commentators' estimates. See also Mihir A. Desai & James R. Hines, Jr., *Expectations and Expatriations: Tracing the Causes and Consequences of Corporate Inversions*, 55 NAT'L TAX J. 409, 418-20 (2002); Andrius R. Kontrimas, Presentation at the 13th Annual International Tax Symposium, 24-25 (Nov. 5, 2010), available at <http://www.texastaxsection.org/LinkClick.aspx?fileticket=t2ZqNOMHQA0%3D&tabid=59>; MARSHA HENRY, *Mergers of Equals: Getting Caught in the § 7874 Corporate Inversion Web—Change the Rules or Change the Game*

corporations, including iconic American brands like Pfizer and Walgreens, publicly contemplated inversions.<sup>13</sup> In the second half of 2014, Burger King announced that it would invert to Ontario, Canada through an \$11 billion acquisition of Canadian chain Tim Hortons.<sup>14</sup> Congress's Joint Committee on Taxation has estimated that stopping inversions could result in a total tax revenue gain of approximately \$19.5 billion over the next ten years.<sup>15</sup>

Inversions have gained attention from many corners. Professor Steven Davidoff Solomon called last year's inversion activity "a feeding frenzy . . . . Every investment banker now has a slide deck that they're taking to any possible company and saying, '[Y]ou have to do a corporate inversion now, because if you don't, your competitors will.'"<sup>16</sup> Around the same

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36-37 (Dec. 4, 2013) (unpublished research paper, Fordham University), *available at* [http://marshahenry.blogs.com/files/corporate\\_inversions\\_december\\_2013.pdf](http://marshahenry.blogs.com/files/corporate_inversions_december_2013.pdf).

<sup>13</sup> See David Gelles, *New Corporate Tax Shelter: A Merger Abroad*, N.Y. TIMES, Oct. 9, 2013, at B1 (citing independent tax advisor Robert Willens, who estimated that there had been about 20 inversions in the last year and a half); Ashley Armstrong, *American Companies Target the UK for Tax*, TELEGRAPH (May 3, 2014), <http://www.telegraph.co.uk/finance/newsbysector/pharmaceuticalsandchemicals/10806840/American-companies-target-the-UK-for-tax.html> (describing the competitiveness of the pharmaceuticals industry and the prevalence of corporate inversion transactions in the industry).

<sup>14</sup> Burger King Worldwide, Inc., Current Report (Form 8-K) (Dec. 12, 2014) (announcing the completion of Burger King's acquisition of Tim Hortons). Through the transaction, Canadian-incorporated Tim Hortons Inc. and Delaware-incorporated Burger King Worldwide, Inc.—the parent company of the Burger King corporate group—would both become indirect subsidiaries of an Ontario, Canada-incorporated corporation and an Ontario, Canada-organized limited partnership. Tim Hortons itself has an interesting incorporation history. Originally a Canadian company, it became part of American restaurant chain Wendy's in 1995. Tim Hortons became a public company incorporated in Delaware after its spin-off from Wendy's in 2006. In 2009, Tim Hortons announced that it would move back to Canada by merging with a newly formed Canadian subsidiary in order to, among other things, take advantage of lower Canadian tax rates commencing in the year following implementation. Tim Hortons Inc., Current Report (Form 8-K) (June 29, 2009) (attaching the company's press release announcing its intention to become a Canadian company through a merger with a newly formed subsidiary); *see also* David Friend, *Tim Hortons Returns Officially to Canada*, TORONTO STAR (Jun. 30, 2009), [http://www.thestar.com/business/2009/06/30/tim\\_hortons\\_returns\\_officially\\_to\\_canada.html](http://www.thestar.com/business/2009/06/30/tim_hortons_returns_officially_to_canada.html) (reporting the company's incorporation history).

<sup>15</sup> Letter from Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation, to Karen McAfee, Democratic Chief Tax Counsel, House Ways and Means Committee (May 23, 2014), *available at* <http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/113-0927%20JCT%20Revenue%20Estimate.pdf>. Note, however, that while this is a large number, it is not a particularly large percentage of the United States's gross domestic product. According to the World Bank, the United States's gross domestic product in 2013 (the last year for which data is available) was \$16.77 trillion. *See United States*, WORLD BANK, <http://data.worldbank.org/country/united-states> (last visited Apr. 5, 2015).

<sup>16</sup> Mark Garrison, *Corporate Inversion: An Expensive Way to Save on Taxes*, MARKETPLACE (Jul. 15, 2014, 4:14 PM), <http://www.marketplace.org/topics/world/corporate-inversion-expensive-way-save-taxes> (reporting on recent inversion activity and quoting Professor Davidoff Solomon).

time, Professor Edward Kleinbard, former chief of staff of Congress's Joint Committee on Taxation, predicted that there would be a "sharknado of inversions."<sup>17</sup>

In response to the surge in inversion announcements in 2014, President Obama's administration proposed tightening anti-inversion rules, the Treasury Secretary made a plea to Congress to pass anti-inversion legislation, and bills were proposed in both houses of Congress.<sup>18</sup> In late September of 2014, the Treasury Department and the Internal Revenue Service (the IRS) issued Notice 2014-52, announcing immediately effective promised regulations that reduced some of the tax benefits of inversions.<sup>19</sup> President Obama appears to have discussed inversions again in the State of the Union address in 2015, noting that "lobbyists have rigged the Tax Code with loopholes that let some corporations pay nothing while others pay full freight," and calling for the closing of loopholes "so we stop rewarding companies that keep profits abroad, and reward those that invest in America."<sup>20</sup>

So far, the conversation, especially in the popular consciousness, has been dominated by the tax story: corporations save millions on their tax bills by inverting, correspondingly causing the U.S. government to lose billions in tax revenue. But there is more to the inversion story. This Article considers the collateral effects of inversions, both for corporations and for the public, and proceeds in four Parts.

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<sup>17</sup> Lori Montgomery, *U.S. Policymakers Gird for Rash of Corporate Expatriations*, WASH. POST (Aug. 6, 2014), [http://www.washingtonpost.com/business/economy/us-policymakers-gird-for-rash-of-corporate-expatriations/2014/08/05/4898ca5e-18d9-11e4-9349-84d4a85be981\\_story.html](http://www.washingtonpost.com/business/economy/us-policymakers-gird-for-rash-of-corporate-expatriations/2014/08/05/4898ca5e-18d9-11e4-9349-84d4a85be981_story.html) (reporting on the surge of inversions expected to come in late 2014 and quoting Professor Kleinbard).

<sup>18</sup> U.S. DEPT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2015 REVENUE PROPOSALS 64-65 (Mar. 2014), *available at* <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2015.pdf> [hereinafter TREAS., GENERAL EXPLANATIONS] (explaining the current corporate inversion law, the proposed change and the rationale for the change); Press Release, Ways and Means Comm. Democrats, House Democrats Introduce Legislation to Tighten Restrictions on Corporate Tax Inversions (May 20, 2014), *available at* <http://democrats.waysandmeans.house.gov/press-release/house-democrats-introduce-legislation-tighten-restrictions-corporate-tax-inversions> (providing coverage of H.R. 4679, which mirrors Senator Levin's proposal to tighten existing corporate inversion rules); Steven Davidoff Solomon, *A Merger in a Race With Congress*, N.Y. TIMES DEALBOOK (Jun. 16, 2014, 1:03 PM), <http://dealbook.nytimes.com/2014/06/16/a-merger-in-a-race-with-congress> (providing coverage of two corporate inversion proposals in the U.S. Senate: Senator Harry Reid's tax holiday proposal, and Senator Carl Levin's proposal to tighten existing corporate inversion rules).

<sup>19</sup> I.R.S. Notice 2014-52, 2014-42 I.R.B. 712 (Sept. 22, 2014).

<sup>20</sup> Press Release, Remarks of President Barack Obama—As Prepared for Delivery State of the Union Address (Jan. 20, 2015), *available at* <https://www.whitehouse.gov/the-press-office/2015/01/20/president-obamas-state-union-address-prepared-delivery>.

Part I introduces the current discourse about inversions. Overwhelmingly, corporations cite the United States's high statutory corporate tax rate, and the lower tax rates of other countries, as reasons for inverting.

Part II provides a robust overview of previous generations of inversions in the United States, highlighting the evolution of inversions from internal reorganizations to today's complex business-combination transactions. This section provides necessary background for understanding how inversions—and inversion policy—can affect business decisions and the public.

Part III considers how today's complex business-combination inversions can affect inverting corporations themselves and potentially create collateral consequences for the public. To be sure, economists and tax policymakers understand that tax policy, including inversion tax policy, changes behavior in potentially costly ways. This Article considers the specific potential hidden costs of inversions for corporations and the public. For corporations, inverting can change business decisions; for instance, companies may deploy capital in potentially sub-optimal ways in service of chasing tax benefits. For the public, the availability of corporate inversions undercuts tax policy, creates distributional consequences across industries and company sizes, and may drive over-consolidation. To craft sound policy, policymakers need to understand inversions's potential for driving these hidden costs and begin to investigate the magnitude of these effects.

Part IV analyzes potential policy solutions, including a theoretical outright ban on inversions, comprehensive tax reform, and middle-of-the-road or temporary solutions.

## I. THE CURRENT DEBATE

The Treasury Department's Office of Tax Policy defines a corporate inversion as "a transaction through which the corporate structure of a U.S.-based multinational group is altered so that a new foreign corporation, typically located in a low- or no-tax country, replaces the existing U.S. parent corporation as the parent of the corporate group."<sup>21</sup> For example, a company that has a Delaware corporation as its

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<sup>21</sup> *Corporate Inversions: Hearing Before the H. Comm. on Ways & Means, 107th Cong. 10-11 (2002)* (statement of Pamela F. Olson, Acting Assistant Secretary for Tax Policy, U.S. Department of the Treasury) (providing a primer on the tax policy implications of corporate inversions in conjunction with a previous generation of corporate inversion transactions).

parent company may invert by setting up a new corporation in a tax-friendly jurisdiction like Ireland and engaging in transactions to make that new Irish corporation the company's top parent company. Inverted companies can save tens of millions—if not hundreds of millions—of dollars in taxes through an inversion and the related restructurings that follow it.

Recently, corporate inversions have kicked up a storm of interest amongst the press, legislators, and policymakers. President Obama, the Treasury Department, and both houses of Congress have discussed inversions.<sup>22</sup> At the same time, corporate inversions are under-explored in the legal academic literature—a handful of articles form the entirety of the literature, and nearly nothing has been written about the current generation of inversion transactions. This Part provides an overview of current discussions, including a summary of what corporations say drives their inversion decisions.

#### A. *The Case for Inverting*

Many corporations assert that they invert to take advantage of another jurisdiction's lower statutory corporate tax rate.<sup>23</sup> For instance, in 2014, Mylan, Inc. announced that it would invert to the Netherlands in conjunction with a purchase of a portion of Abbott Laboratories. At the time, Abbott's Chief Executive Officer wrote in *The Wall Street Journal* that, "[i]n terms of global competitiveness, the U.S. and U.S. companies are at a substantial disadvantage to foreign companies . . . . Our disproportionately higher tax rate [puts] foreign companies at a huge advantage competitively."<sup>24</sup> The Mylan inversion is expected to lower Mylan's global effective tax rate from 25% to 21% in the first year, and to the high teens over time.<sup>25</sup> This

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<sup>22</sup> See U.S. DEPT. OF THE TREASURY, *supra* note 18; see also *supra* text accompanying notes 19-20.

<sup>23</sup> Michael J. Graetz, *Inverted Thinking on Corporate Taxes*, WALL ST. J. (Jul. 16, 2014, 7:46 PM), <http://online.wsj.com/articles/michael-j-graetz-inverted-thinking-on-corporate-taxes-1405554359> ("At 35%, [the United States] now ha[s] the highest statutory corporate [tax] rate in the Organization for Economic Cooperation and Development, which has 34 developed countries as members."); see *Hearing*, *supra* note 21 (noting that U.S.-based companies reincorporate abroad to take advantage of tax savings).

<sup>24</sup> Miles D. White, *Ignoring the Facts on Corporate Inversions*, WALL ST. J. (Jul. 17, 2014, 7:06 PM), <http://www.wsj.com/articles/miles-d-white-ignoring-the-facts-on-corporate-inversions-1405638376>.

<sup>25</sup> Anna Prior, *Abbott Labs to Sell Generic Drug Assets to Mylan*, WALL ST. J. (Jul. 14, 2014, 10:00 AM), <http://online.wsj.com/articles/abbott-laboratories-to-sell-developed-generics-business-to-mylan-1405335643> (reporting that, as a result of Abbott/Mylan deal, Mylan would lower its global effective tax rate from about 25% to about 21% in its first year, and even lower in subsequent years).

particular justification for inverting—the desire to chase a lower statutory tax rate—is often viewed as simplistic. While the United States’s statutory corporate tax rate is high—at 35%, it is the highest corporate tax rate among developed countries—its effective tax rate is similar to the average of developed countries belonging to the Organization for Economic Cooperation and Development (OECD).<sup>26</sup>

Inverting companies also cite the United States’s worldwide tax regime as a driver of inversions.<sup>27</sup> Domestic corporations pay taxes on the entirety of their income, regardless of where it is earned—a worldwide tax regime.<sup>28</sup> At the same time, if foreign-earned income is taxed in the foreign jurisdiction, domestic corporations can claim a foreign tax credit on their U.S. taxes for taxes already paid to foreign jurisdictions on foreign-earned income, which mitigates some of the effect of a worldwide tax regime. When that foreign-earned income is brought back into the United States, however, it is taxed at the higher U.S. rate.<sup>29</sup> In practice, the United States’s worldwide tax regime means that no matter where a domestic corporation earns its income, the income will be taxed at the higher U.S. rate once repatriated to the United States. Many other developed countries have territorial, rather than worldwide, tax regimes—that is, only the income a corporation earns within the territory is taxed by that

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<sup>26</sup> The average effective tax rate of OECD countries is approximately 27.7%, and the United States’s effective tax rate is approximately 27.1% (both figures are weighted effective tax rates, which are adjusted to account for the size of the economies). Moreover, the United States collects less tax as a percentage of gross domestic product than the OECD average. MARK P. KEIGHTLEY & MOLLY F. SHERLOCK, CONG. RESEARCH SERV., R42726, THE CORPORATE INCOME TAX SYSTEM: OVERVIEW AND OPTIONS FOR REFORM, 13 tbl. 2 (2014).

<sup>27</sup> Stuart Webber, *Escaping the U.S. Tax System: From Corporate Inversions to Re-Domiciling*, 63 TAX NOTES INT’L 273, 277 (2011) (describing that many inverting companies do not articulate any operational benefits generated by their corporate inversions; rather, the rationales for inverting are entirely tax-driven).

<sup>28</sup> KEIGHTLEY & SHERLOCK, *supra* note 26, at 6 (“The United States taxes American corporations on their worldwide income.”); Elizabeth Chorvat, *You Can’t Take It With You: Behavioral Finance and Corporate Expatriations*, 37 U.C. DAVIS L. REV. 453, 460 (2003) (describing the worldwide tax system); Michael Kirsch, *The Congressional Response to Corporate Expatriations: The Tension Between Symbols and Substance in the Taxation of Multinational Corporations*, 24 VA. TAX REV. 475, 484-85 (2005) (describing the United States’s corporate tax system as one that generally taxes worldwide income, regardless of the source of the income).

<sup>29</sup> Chorvat, *supra* note 28, at 459 (“Any income that arises from cross-border transactions is potentially subject to tax in two more jurisdictions: the residence country and the source country.”) and at 463 (“[T]he U.S. tax system allows a limited credit against U.S. tax, available for certain income taxes paid to foreign countries, thereby mitigating the double taxation of U.S. taxpayers on foreign source income.”); see I.R.C. § 901 (setting forth how the taxes imposed by the Internal Revenue Code shall be credited with certain allowances, and the amount of such allowances); KEIGHTLEY & SHERLOCK, *supra* note 26, at 6 (describing that under current tax law, “corporations are allowed a credit, known as a foreign tax credit, for taxes paid to other countries”).



territory. By escaping the United States's worldwide tax regime to a jurisdiction with a territorial tax regime, corporations can also save on taxes.<sup>30</sup>

Because the United States taxes income at the higher U.S. rate when it is repatriated, corporations can defer paying U.S. tax by keeping foreign-earned income overseas indefinitely.<sup>31</sup> *Bloomberg* recently estimated that U.S. companies kept about \$2 trillion of foreign income overseas in order to avoid paying U.S. taxes upon repatriation.<sup>32</sup> According to commentators, inversions allow corporations to access this cash "trapped" overseas.<sup>33</sup> When American medical device maker Medtronic announced its inversion to Ireland through the purchase of Irish company Covidien, Medtronic's former CEO told *The New York Times* that "[t]he only reason [Medtronic is] doing the inversion is to free up the cash overseas . . . . That money today can't be put to good use right now."<sup>34</sup> Medtronic will use that trapped cash to buy Covidien.<sup>35</sup> In the process, Medtronic will invert to Ireland and also gain access to Covidien's cash flow, which is generated from earnings taxed at the lower Irish rate.<sup>36</sup> That cash will not need to be repatriated to the United States and taxed at the higher U.S. rate. Note that if Medtronic had acquired Covidien in a more traditional, non-inversion

<sup>30</sup> Chorvat, *supra* note 28, at 460 (describing the two main ways of dealing with double taxation as the "worldwide" or 'credit' method, in which the residence country taxes foreign source income but provides a credit for taxes paid to foreign jurisdictions," and the "territorial" or 'exemption' method, under which the residence country cedes all taxing jurisdiction to the source country.").

<sup>31</sup> Chorvat, *supra* note 28, at 465 ("[I]ncome that U.S. corporations earn through foreign subsidiaries is not subject to tax in the United States until the income is repatriated back to the U.S. parent corporation."); Orsolya Kun, *Corporate Inversions: The Interplay of Tax, Corporate, and Economic Implications*, 29 DEL. J. CORP. L. 313, 333 (2004) ("Income earned from non-U.S. operations of foreign corporate subsidiaries of a domestic parent corporation is generally subject to U.S. tax only when distributed as a dividend to the domestic corporation.").

<sup>32</sup> David Welch & Manuel Baigorri, *Offshore Cash of \$2 Trillion Sparks Hunt for Tax-Friendly Deals*, BLOOMBERG BUS. (Jun. 16, 2014, 7:01 PM), <http://www.bloomberg.com/news/2014-06-16/offshore-cash-of-2-trillion-sparks-hunt-for-tax-friendly-deals.html>.

<sup>33</sup> Vanessa Houlder et al., *Tax Avoidance: The Irish Inversion*, FIN. TIMES (Apr. 29, 2014, 5:47 PM), <http://www.ft.com/cms/s/2/d9b4fd34-ca3f-11e3-8a31-00144feabdc0.html#axzz37x2JQSc> (describing the phenomenon of U.S. companies "shifting their headquarters abroad to protect growing overseas cash piles.").

<sup>34</sup> David Gelles, *In Medtronic's Deal for Covidien, an Emphasis on Tax Savings*, N.Y. TIMES DEALBOOK (Jun. 16, 2014, 8:29 PM), <http://dealbook.nytimes.com/2014/06/16/in-medtronics-deal-for-covidien-an-emphasis-on-tax-savings> (describing Medtronic's focus on tax savings and accessing trapped cash in its acquisition of Covidien and quoting former Medtronic CEO Bill George).

<sup>35</sup> *Id.*; Lee Schafer, *A Move to Ireland Lets Medtronic Move Its "Trapped Cash,"* STAR TRIB. (Jun. 17, 2014, 5:38 AM), <http://www.startribune.com/business/263378681.html>.

<sup>36</sup> *Id.*

transaction, Covidien's earnings may have been passed through Medtronic and been used to pay dividends to Medtronic's shareholders. This would have subjected Covidien's earnings to U.S. tax.

According to some commentators and inverting companies, the trapped cash problem has ripple effects on the economy. A domestic corporation may keep and invest its money outside of the United States in order to avoid paying U.S. taxes on that foreign-earned income. As a result, the U.S. economy does not benefit from foreign-earned income being invested back to the United States. However, the extent of the trapped cash problem is disputed. A 2011 study on offshore cash held by large corporations commissioned by Senator Carl Levin found that about 46% of those corporations' tax-deferred offshore funds were actually held in bank accounts in the United States or invested in American assets.<sup>37</sup> In addition, about a third of the companies surveyed "had placed between three-quarters and half of their tax-deferred offshore funds in U.S. assets."<sup>38</sup> These results suggest that a substantial amount of "trapped cash" is already back in the United States and being invested in U.S. assets or held in U.S. bank accounts.

Companies also use inversions to add intercompany debt and "strip earnings" from their U.S.-taxable income. Post-inversion, the foreign parent company loans money to its domestic subsidiary, and that domestic subsidiary takes a tax deduction for interest paid to the parent.<sup>39</sup> One accounting study notes that "[d]espite managements' claims that inversion-related savings will be due to the avoidance of U.S. tax on foreign earnings, . . . most of the tax savings is attributable to avoidance of U.S. tax on U.S. earnings [through earnings stripping]."<sup>40</sup> The Treasury Department also noted in a 2002 report that corporate inversions facilitate earnings stripping, and in a 2007 report that "[i]nversion transactions

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<sup>37</sup> Offshore Funds Located Onshore 4 (2011), available at <http://www.hsgac.senate.gov/subcommittees/investigations/media/new-data-show-corporate-offshore-funds-not-trapped-abroad-nearly-half-of-so-called-offshore-funds-already-in-the-united-states>.

<sup>38</sup> *Id.*

<sup>39</sup> Jim A. Seida & William F. Wempe, *Effective Tax Rate Changes and Earnings Stripping Through Corporate Inversion*, 57 NAT'L TAX J. 805, 806 (2004) (describing the prevalence of earnings stripping among inverting companies).

<sup>40</sup> *Id.* at 807.

provide evidence that the earnings stripping rules are not fully achieving their intended purposes.”<sup>41</sup>

### *B. Government Responses to Inversions*

Since a corporation’s tax savings is a government’s loss, policymakers have taken notice. In response to three previous generations of corporate inversions, legislators and policymakers have imposed a number of rules that make it impossible for corporations to leave the United States only for tax purposes, as they did in earlier generations of inversions. Current rules ensure that companies incorporated in domestic jurisdictions can invert out of the United States only in connection with a foreign acquisition.<sup>42</sup> Despite this rule, inversion activity is once again on the rise. In response to the inversion activity in the past few years, the President, Treasury Secretary, and members of Congress have proposed tax-based policy solutions.

President Obama’s Fiscal Year 2015 Budget included a proposal to strengthen and expand current anti-inversion rules.<sup>43</sup> Senator Carl Levin introduced a bill mirroring the President’s proposal.<sup>44</sup> In the press release accompanying the proposed legislation, Senator Levin described corporate inversions as “about tax avoidance, plain and simple.”<sup>45</sup> Senator Sheldon Whitehouse called the Levin bill a “common sense tax fairness bill” and declared that “[m]ergers should be driven by economics, not tax avoidance.”<sup>46</sup> Senator Tim Kaine echoed the sentiments, saying that the bill was about “rooting out flagrant abuse in our system that could lead to billions of dollars of lost

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<sup>41</sup> U.S. DEP’T. OF THE TREASURY, REPORT TO THE CONGRESS ON EARNINGS STRIPPING, TRANSFER PRICING AND U.S. INCOME TAX TREATIES 1-2, 10 (2007), <http://www.treasury.gov/resource-center/tax-policy/Documents/ajca2007.pdf>.

<sup>42</sup> See *infra* Part II.

<sup>43</sup> TREAS., GENERAL EXPLANATIONS, *supra* note 18, at 64-65 (describing the current provisions of Section 7874, with a particular focus on the ownership test prong, and outlining the federal budget’s proposal).

<sup>44</sup> Stop Corporate Inversions Act of 2014, S. 2360, 113th Cong. (2014) (proposing “[t]o amend the Internal Revenue Code of 1986 to modify the rules relating to invert[ing] corporations”).

<sup>45</sup> Press Release, Senator Ben Cardin, Senators Introduce Bill to Clamp Down on Inversions Tax Loophole (May 20, 2014), *available at* <http://www.cardin.senate.gov/newsroom/press/release/senators-introduce-bill-to-clamp-down-on-inversions-tax-loophole> (announcing the Stop Corporate Inversions Act of 2014 and quoting Senator Levin).

<sup>46</sup> *Id.* (quoting Senator Whitehouse).

revenue.”<sup>47</sup> Representative Sander Levin also introduced a companion bill in the House of Representatives.<sup>48</sup>

In July of 2014, Treasury Secretary Jack Lew sent a letter to the House of Representatives’ Ways and Means Committee, urging Congress to pass anti-inversion legislation and to enact tax system reform. Secretary Lew noted that “these [inverting] firms are attempting to avoid paying taxes here, notwithstanding the benefits they gain from being located in the United States,” and called for “a new sense of economic patriotism, where we all rise or fall together.”<sup>49</sup> Later in July, Senator Levin—along with Senator Dick Durbin, and two Democrats in the House of Representatives—introduced another anti-inversion bill: The No Federal Contracts for Corporate Deserters Act.<sup>50</sup> The Levin-Durbin anti-inversion bill aimed to expand existing limitations on awarding federal contracts to foreign corporations.<sup>51</sup> Separately, Senators Harry Reid and Rand Paul advocated for a one-time tax break to allow companies to repatriate foreign-earned income to the United States, which may reduce some corporations’ incentives to invert, at least in the short term.<sup>52</sup>

Former Treasury Department official Stephen Shay has also joined the fray, arguing that the Treasury Department is empowered to and should take action—specifically, by reclassifying interest from intercompany debt (which is deductible) as equity (which is not).<sup>53</sup> This may significantly reduce the savings from inversions, much of which comes from post-inversion restructurings that take advantage of interest deductions. Likewise, Senator Charles Schumer’s anti-inversion proposal also tackles the intercompany debt and earnings stripping issue by

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<sup>47</sup> *Id.* (quoting Senator Kaine).

<sup>48</sup> Stop Corporate Inversions Act of 2014, H.R. 4679, 113th Congress (2014) (proposing “[t]o amend the Internal Revenue Code of 1986 to modify the rules relating to invert[ing] corporations.”).

<sup>49</sup> Letter from Jacob J. Lew, U.S. Treas. Sec’y, to Dave Camp, Chairman, H. Comm. on Ways & Means (Jul. 15, 2014), *available at* <http://im.ft-static.com/content/images/89217f94-0ca4-11e4-943b-00144feabdc0.pdf>.

<sup>50</sup> David Gelles, *New Legislation Targets Inversions from Different Angle*, N.Y. TIMES DEALBOOK (Jul. 29, 2014, 1:09 PM), <http://dealbook.nytimes.com/2014/07/29/new-legislation-targets-inversions-from-different-angle/>.

<sup>51</sup> Press Release, Office of Congresswoman Rosa DeLauro, Leading Congressional Democrats Introduce The No Federal Contracts for Corporate Deserters Act, (Jul. 29, 2014), *available at* [http://delauro.house.gov/index.php?option=com\\_content&view=article&id=1662:leading-congressional-democrats-introduce-the-no-federal-contracts-for-corporate-deserters-act&catid=2&Itemid=21](http://delauro.house.gov/index.php?option=com_content&view=article&id=1662:leading-congressional-democrats-introduce-the-no-federal-contracts-for-corporate-deserters-act&catid=2&Itemid=21).

<sup>52</sup> Jonathan Weisman, *Plan to Refill Highway Fund Stokes Conflict in Congress*, N.Y. TIMES, Jun. 10, 2014, at A15 (providing coverage of plans to replenish the Highway Trust Fund, including the tax holiday proposal).

<sup>53</sup> Stephen E. Shay, *Mr. Secretary, Take the Tax Juice Out of Corporate Expatriations*, 144 TAX NOTES 473, 475 (2014).

limiting interest deductions.<sup>54</sup> Senator Schumer's plan "would reduce the amount of deductible interest for inverted [corporations]" and restrict corporations' ability to carry forward deductions to future years.<sup>55</sup>

After months of debate and proposed legislation, in September of 2014, Treasury and the IRS issued Notice 2014-52, announcing planned regulations aimed at reducing the tax benefits of inversions.<sup>56</sup> The promised regulations attempt to combat inversions in three major ways.

First, and most significantly, the regulations eliminate the benefits from so-called "hopscotch loans." Hopscotch loans are intercompany loans that allow domestic corporations to avoid certain taxes. Prior to the Notice, domestic corporations that received loans from their controlled foreign corporations (CFCs) had to treat the loans as if the money had been repatriated to the United States as a dividend, and therefore had to pay taxes on that dividend. Using a hopscotch loan, a corporation avoids those taxes by causing a CFC to make a loan to the domestic corporation's new foreign parent company, rather than to the domestic corporation directly. The promised regulations eliminate the benefits of hopscotch loans by making these loans subject to the same tax that would be owed if the CFC had made the loan directly to the domestic corporation.

Second, the promised regulations reduce the tax benefits of typical post-inversion restructuring strategies. For instance, many post-inversion restructurings cause former CFCs of the domestic corporation to become direct subsidiaries of the new foreign parent—a technique known as "out from under planning." The promised regulations will treat the new foreign parent as continuing to own the CFC indirectly through the domestic corporation. This means that the subsidiary continues to be a CFC subject to U.S. taxation.

Third, the new regulations strengthen existing requirements regarding the size of merger partners. Modern inversions are accomplished through cross-border business combinations, and existing rules specify that shareholders of the U.S. inverter cannot hold more than 60% or 80% of the

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<sup>54</sup> S. 2786, 113th Cong. (proposed Sept. 10, 2014), *available at* <https://www.congress.gov/113/bills/s2786/BILLS-113s2786is.pdf> (last accessed Jan. 6, 2015).

<sup>55</sup> Richard Rubin, *Schumer Details Interest Deduction Limits in Inversions*, BLOOMBERG BUS. (Aug. 14, 2014, 1:14 PM), <http://www.bloomberg.com/news/2014-08-14/schumer-details-interest-deduction-limits-in-inversions.html>.

<sup>56</sup> See I.R.S. Notice 2014-52, *supra* note 19; *Fact Sheet: Treasury Actions to Rein in Corporate Tax Inversions*, U.S. DEP'T OF TREASURY (Sept. 22, 2014), <http://www.treasury.gov/press-center/press-releases/Pages/jl2645.aspx>.

stock of the combined company post-combination. (Certain restrictions apply if shareholders hold more than 80% of the combined company's stock, and additional restrictions apply at the 60% threshold.)<sup>57</sup> In order to meet the 60% or 80% thresholds, companies sometimes manipulate the size of the target foreign business partner—for instance, by paying a special “skinny down” dividend prior to the inversion in order to reduce the target's size. The new regulations disregard many of these efforts to manipulate the computation of whether the 60% or 80% thresholds have been met.

The Notice ends with a note that the IRS “expects to issue additional guidance to further limit inversion transactions,” and, “[i]n particular, . . . guidance to address strategies that avoid U.S. tax on U.S. operations by shifting or ‘stripping’ U.S.-source earnings to lower-tax jurisdictions, including through intercompany debt.”<sup>58</sup>

The Notice, like several previous generations of inversion policy, is precisely calculated to reduce the benefits of present-generation inversion transactions. Practitioners have noted that the Notice “takes a significant step in eliminating many of the tax benefits that could be derived from post-inversion transactions with the U.S. company's new foreign affiliates,”<sup>59</sup> and “threatens the possibility of future restrictions on [earnings stripping].”<sup>60</sup>

### C. *Inversion Scholarship*

While it is clear that policymakers and the press have spilled much ink about corporate inversions, these transactions are under-explored in the legal academic literature. Among the most comprehensive doctrinal articles on corporate inversions is a decade-old student note that explains features of the U.S. corporate tax system that motivate corporate inversions and advances a behavioral finance theory to explain inversion

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<sup>57</sup> See *infra* note 114 and accompanying text.

<sup>58</sup> *Id.*

<sup>59</sup> KIM BLANCHARD & DAVIS BOWER, WEIL GOTSHAL & MANGES LLP, TAX ALERT: IRS ISSUES MORE RULES AFFECTING INVERSIONS (Sept. 29, 2014), *available at* [http://www.weil.com/~media/files/pdfs/tax\\_alert\\_irs\\_affects\\_inversions\\_v41.pdf](http://www.weil.com/~media/files/pdfs/tax_alert_irs_affects_inversions_v41.pdf) (summarizing key components of Notice 2014-52 in a notice to clients).

<sup>60</sup> MICHAEL L. SCHLER, CRAVATH, SWAINE & MOORE LLP, NEW TAX RESTRICTIONS ON INVERSIONS, *available at* [http://www.cravath.com/files/uploads/Documents/Publications/3494991\\_1.PDF](http://www.cravath.com/files/uploads/Documents/Publications/3494991_1.PDF) (last access Mar. 22, 2015) (summarizing Notice 2014-52 in a notice to clients).

activity.<sup>61</sup> Another decade-old article compares differences in corporate governance law between the United States and Bermuda (a popular inversion destination for prior-generation inverters).<sup>62</sup> Professor Michael Kirsch also contributed an article in 2005 focusing on Congressional responses to corporate inversions, analyzing the symbolic and social-norm aspects of the responses.<sup>63</sup> On the empirical side, Professors Mihir A. Desai and James R. Hines's article tracing the empirical determinants of corporate inversions, with a focus on the then-in-progress Stanley Works inversion (which was later canceled due to public pressure), is particularly thorough.<sup>64</sup> Professors Jim A. Seida and William F. Wempe's accounting scholarship provides insight into how inverters use intercompany debt to strip earnings during and after inversions.<sup>65</sup>

In contrast to previous work, which generally focuses on individual clusters of inversion activity, this Article considers the development of inversion activity in the United States over several decades. It also contributes an analysis of the tax and non-tax collateral consequences of inversion activity and considers how inversions impact corporations and the public.

## II. THE DEVELOPMENT OF CORPORATE INVERSIONS IN THE UNITED STATES

Inversions have collateral consequences for both corporations and the public, and these consequences ought to be considered as policymakers grapple with the next generation of inversion policy. Since the first inversion in the early 1980s, corporations have tried to save on taxes through corporate inversions, and the government has battled inversion activity with tax laws and regulations. The result has been four generations of inversions, in which the hidden costs of inversion policy have risen steadily. Analyzing the history of

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<sup>61</sup> See generally Chorvat, *supra* note 28 (arguing that the corporate inversions of the late 1990s and early 2000s may be explained by corporate managers exploiting market imperfections to reduce the cost of inverting to a level that makes it profitable for companies to invert). Chorvat also followed up with a work in progress that argues that policymakers are incorrectly penalizing inversion activity by designing the tax penalty around the stock price at the time of inversion. See Elizabeth Chorvat, "Looking Through" *Corporate Expatriations for Buried Intangibles* (University of Chicago, Public Law Working Paper No. 445, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2309915](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309915).

<sup>62</sup> See Kun, *supra* note 31.

<sup>63</sup> See Kirsch, *supra* note 28, at 483-84.

<sup>64</sup> See Desai & Hines, *supra* note 12.

<sup>65</sup> See Seida & Wempe, *supra* note 39.

these transactions is critical to addressing future generations of corporate inversion activity. This Part overviews the four generations of corporate inversion activity and government responses.

### A. *The First Generation*

Tax has always been the centerpiece of the corporate inversion conversation. The early 1980s saw one of the first corporate inversions: McDermott Inc.'s move to Panama.<sup>66</sup> McDermott was a Delaware-incorporated, Texas-headquartered public company that provided engineering and other services related to offshore oil and gas operations.<sup>67</sup>

In 1982, McDermott announced that it would invert to Panama.<sup>68</sup> One of McDermott's Panamanian subsidiaries, McDermott International, launched a public tender offer for McDermott Inc.'s shares, offering to buy shares of McDermott Inc. from McDermott Inc.'s public shareholders in exchange for newly issued shares of McDermott International and cash.<sup>69</sup> When the transaction was completed, McDermott International was the parent company, and McDermott Inc. was one of its U.S. subsidiaries.<sup>70</sup>

McDermott enjoyed many tax benefits as a result of inverting to Panama: in its disclosures, McDermott noted that the inversion "enable[d] the McDermott Group to retain, re-invest and redeploy earnings from operations outside the United States without subjecting such earnings to United States income tax."<sup>71</sup> The company cited mounting global competition as a driving factor

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<sup>66</sup> Reuven S. Avi-Yonah, *For Haven's Sake: Reflections on Corporate Inversion Transactions*, 95 TAX NOTES 1793, 1793 (2002) (describing the McDermott corporate inversion as "[t]he first well-known corporate inversion from the U.S."); Hicks, *supra* note 11 (describing McDermott's corporate inversion as "[t]he first inversion transaction that generated a significant amount of government and tax community attention"); Kirsch, *supra* note 28, at n.1 (describing the "first modern inversion" as having occurred in 1983); Steven Surdell, *Inversions 2014—Self-Help International Tax Reform for U.S. Multinationals?*, 92 TAXES—THE TAX MAG., Mar. 2014, at 63, 64-65 (describing McDermott's corporate inversion as "[o]ne of the earliest and most well-known corporate inversion transactions" and outlining the structure of the transaction).

<sup>67</sup> Surdell, *supra* note 66, at 64.

<sup>68</sup> Because McDermott's shareholders received some cash in the transaction, the corporate inversion was taxable to McDermott's shareholders—however, most shareholders recognized a loss. *See id.* at 64-65; Hicks, *supra* note 11, at 903.

<sup>69</sup> Hicks, *supra* note 11, at 903; Surdell, *supra* note 66, at 65.

<sup>70</sup> After the transaction was completed in 1983, public shareholders owned about 90% of McDermott International's stock, and McDermott International owned most of the stock of McDermott Inc., which was at that point a U.S. subsidiary of McDermott International. *See Hicks, supra* note 11, at 903-04.

<sup>71</sup> Surdell, *supra* note 66, at 59.



in its decision, stating that the inversion “will enable the McDermott Group to compete more effectively with foreign companies by taking advantage of additional opportunities for expansion which require long-term commitments, the redeployment of assets and the reinvestment of earnings.”<sup>72</sup>

McDermott’s corporate inversion kicked off the first generation of inversions. McDermott reveled in its tax savings (estimated to be about \$200 million<sup>73</sup>), accomplished through a transaction that was tax-free to the corporation. Congress responded by adding Section 1248(i) to the Internal Revenue Code of 1986 (the Code), making McDermott-like transactions taxable.<sup>74</sup>

Here, we pause to take a deeper dive into some of the technical details of the McDermott transaction. First, how was McDermott able to “redeploy earnings from operations outside the United States without subjecting such earnings to United States income tax” after its inversion?<sup>75</sup> Generally, U.S. companies can defer payment on their foreign-earned income until that income is repatriated to the United States. However, the so-called subpart F anti-deferral rules provide that certain types of mobile subpart F income earned by CFCs are taxed when earned, *not* when repatriated into the United States.<sup>76</sup> Before its inversion, McDermott International was a CFC—it could not defer paying taxes on subpart F income. The inversion allowed McDermott International and its foreign subsidiaries to shed their CFC statuses.<sup>77</sup> As non-CFCs, these foreign companies were no longer subject to subpart F rules, so they did not have to pay taxes in the United States on subpart F income.

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<sup>72</sup> *Id.*

<sup>73</sup> Hicks, *supra* note 11, at 904.

<sup>74</sup> Initially, the government responded by suing McDermott and trying to impose a shareholder-level tax, but that case was unsuccessful. *See Bhada v. Comm’r*, 89 T.C. 959 (1987), *aff’d*, 892 F.2d 39 (6th Cir. 1989). In *Bhada*, the IRS argued that McDermott shareholders received a taxable distribution from McDermott under a Code Section 304(a) transaction, which would have negative tax consequences for McDermott’s shareholders. Code Section 304(a) applies when a subsidiary acquires a parent company’s stock from parent shareholders in exchange for property. For a detailed discussion of *Bhada*, see Surdell, *supra* note 66, at 66.

<sup>75</sup> Surdell, *supra* note 66 at 65.

<sup>76</sup> Treas. Reg. §§ 1.951-1-1.964-5 (2012). “Subpart F rules” refer to rules under Chapter 1, Subchapter N, Part III, Subpart F (§§ 951-65) of the Code.

<sup>77</sup> McDermott International was, prior to the corporate inversion, a CFC of McDermott Inc. When McDermott International’s stock became widely held by the public and fewer than 50% of the company was owned by shareholders who owned 10% or more of McDermott International, McDermott International and the foreign subsidiaries organized under it ceased to qualify as CFCs. Hicks, *supra* note 11, at 904 (describing the mechanism by which McDermott International ceased being a CFC); *see also* I.R.C. § 957(a) (defining a CFC as a foreign corporation if more than 50% of the corporation is owned by U.S. shareholders who each own 10% or more of the company).

Anti-deferral rules explain why McDermott's inversion was not taxable to the corporation. Section 1248 is an anti-deferral rule. If Section 1248 applies to a particular transaction, the income from the sale of stock in the transaction is taxed: specifically, a foreign corporation's earnings are treated as though they were distributed as a dividend to the corporation's U.S. shareholder (in tax parlance, these earnings are "deemed dividends").<sup>78</sup> At the time McDermott inverted, McDermott-like transactions were not subject to Section 1248. The addition of Section 1248(i) ensured that de-controlling transactions like McDermott's were subject to Section 1248. Recall that in the McDermott transaction, McDermott Inc. owned all of McDermott International, and McDermott International bought its McDermott Inc. stock directly from McDermott Inc. Post-Section 1248(i), those types of transactions would be recharacterized, and for tax purposes, the IRS would pretend that two things had happened: (1) McDermott Inc. had first received McDermott International stock, and (2) had then transferred the stock to McDermott Inc.'s shareholders. Thus, McDermott Inc. would need to recognize and pay taxes on dividend income with respect to the previously untaxed earnings and profits of McDermott International under Section 1248(f).<sup>79</sup> In effect, for de-CFC-ing transactions, Section 1248(i) treated that foreign-earned income as repatriated to the United States and taxed it. However, Section 1248(i) did not remove all of the potential tax benefits: the taxable amount is limited by several factors, such as the foreign tax credit position of the former U.S. parent company. In addition, Section 1248(i) does not require the former U.S. parent company to recognize gain in excess of the former CFC's earnings and profits.<sup>80</sup>

Section 1248(i) was the government's first tax-based attack on corporate inversions, but it would not be the last.

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<sup>78</sup> Specifically, if a U.S. person (such as a domestic corporation incorporated in a U.S. jurisdiction, like McDermott Inc.) satisfying certain ownership requirements sells or exchanges stock in a CFC, then the gain recognized on the sale or exchange is included as a dividend in the gross income of the U.S. person, up to the amount of the earnings and profits of the CFC. See WILLIAM R. SKINNER, FENWICK & WEST LLP, SECTION 1248 AND DISPOSITIONS OF CFC STOCK (Jan. 18, 2013), available at [http://content.fenwick.com/FenwickDocuments/Section\\_1248\\_Outline.pdf](http://content.fenwick.com/FenwickDocuments/Section_1248_Outline.pdf) (describing Section 1248 and dispositions of CFC stock thereunder); see also I.R.C. § 1248 (2012).

<sup>79</sup> Hicks, *supra* note 11, at 904; see generally I.R.C. § 1248 (2012) (providing the rules under which gain from certain sales and exchanges of stock in certain foreign corporations will be taxed). Additionally, because McDermott "transferred" the stock to its shareholders, the stock issuance to its shareholders would be a transaction that was taxable to McDermott Inc. under Code Section 311. See Surdell, *supra* note 66, at 66.

<sup>80</sup> Hicks, *supra* note 11, at 905.

## B. *The Second Generation*

Corporate inversion activity quieted for nearly a decade after McDermott. Along with the addition of Section 1248(i), bad press related to inversions may have also played a role in slowing inversion activity: a failed lawsuit against McDermott by the IRS earlier in the corporate inversion process drew negative attention from the press and public. But in the mid-1990s, Helen of Troy Corporation inverted to Bermuda.

Texas-incorporated Helen of Troy got its start selling wigs in El Paso, Texas in the 1960s.<sup>81</sup> To say that Helen of Troy “grew over the years” would be an immense understatement: today, Helen of Troy calls itself a “consumer products” company,<sup>82</sup> and distributes a variety of everyday products, including products marketed under brands like Dr. Scholl’s, Vidal Sassoon, OXO, PUR, Braun, and Vicks.<sup>83</sup>

In 1994, Helen of Troy inverted to Bermuda. Like McDermott before it, Helen of Troy noted in its public filings that the transaction would provide “greater flexibility in structuring its international business activities to minimize its non-U.S. income taxes.”<sup>84</sup> The transaction was tax-free to the corporation. To avoid Section 1248(i)’s tax on the earnings and profits of CFCs, Helen of Troy set up a brand-new non-CFC corporation that had no earnings and no profits.<sup>85</sup>

The government, as before, waged its war on tax grounds. In 1996, the IRS issued regulations under Section 367(a) of the Code.<sup>86</sup> Unlike Section 1248(i), which taxed the inverting corporation, the new regulations targeted shareholders by imposing a shareholder-level tax on inversions.<sup>87</sup>

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<sup>81</sup> Vic Kolenc, *Momentum: New Brands Put El Paso Company Helen of Troy on Path to \$1 Billion* (May 29, 2011, 12:00 AM), EL PASO TIMES, [http://www.elpasotimes.com/business/ci\\_18162555](http://www.elpasotimes.com/business/ci_18162555) (describing Helen of Troy’s acquisition of several new brands); Surdell, *supra* note 66, at 67; *Investor Relations—General*, HELEN OF TROY, <http://www.hotus.com/investor-relations/general/> (last visited Mar. 6, 2015) (describing Helen of Troy’s founding).

<sup>82</sup> *About Helen of Troy*, HELEN OF TROY, <http://www.hotus.com/about/> (last visited Jan. 31, 2015) (providing an overview of Helen of Troy’s business and products).

<sup>83</sup> *Our Brands*, HELEN OF TROY, <http://www.hotus.com/our-brands/> (last visited Jan. 31, 2015) (providing a list of some of Helen of Troy’s current brands).

<sup>84</sup> Surdell, *supra* note 66, at 67 (quoting Helen of Troy’s prospectus).

<sup>85</sup> Hicks, *supra* note 11, at 905.

<sup>86</sup> The IRS previewed its response in 1994 by issuing Notice 94-46, which announced that new corporate inversion-related regulations would be forthcoming under I.R.C. § 367(a). In the meantime, it issued interim guidance, which was substantially similar to the final regulations. See I.R.S. Notice 94-46, 1994-1 C.B. 356.

<sup>87</sup> Hicks, *supra* note 11, at 905; see Surdell, *supra* note 66, at 68-70; see also Treas. Reg. § 1.367(a)-3(c) (2014). I.R.C. § 367(a) taxed transfers of U.S. stock “outbound” to a foreign corporation and did not apply to U.S. persons who owned less

For readers interested in the technical workings of the Section 367(a) regulation, an understanding of Section 367(a) prior to Helen of Troy is necessary. Under general “non-recognition rules,” certain types of corporate transactions can be accomplished tax-free: tax-free liquidations,<sup>88</sup> tax-free transfers of property in exchange for control in a corporation,<sup>89</sup> shareholder tax-free exchanges in a reorganization,<sup>90</sup> and a few others. Section 367(a) overrides the non-recognition treatment afforded to these transactions in cases where a foreign corporation is involved. At the time of Helen of Troy’s corporate inversion, Section 367(a) did not apply to transactions like Helen of Troy’s—that is, Helen of Troy’s type of transaction would have been tax-free. Specifically, Section 367(a) did not apply to U.S. persons who transferred stock to foreign corporations if the U.S. person owned less than 5% of the foreign corporation’s stock after the transfer.<sup>91</sup>

After the new Section 367(a) regulations went into effect, avoiding shareholder-level taxation under Section 367(a) became harder: several additional requirements had to be met. First, all of the U.S. persons transferring stock to the foreign corporation must, as a group, own 50% or less of the resulting foreign corporation’s stock.<sup>92</sup> This is a big deviation from before the regulation, when a U.S. transferor’s individual tax liability was determined based on individual ownership, rather than ownership as a group. Second, certain U.S. insiders cannot, as a sub-group, end up owning more than 50% of both the voting power and the value of the foreign company after the transaction.<sup>93</sup> Third, each individual U.S. transferor must either

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than 5% of the vote and value of the foreign corporation immediately after the transfer. Even those who owned more than 5% of the foreign corporation after the transfer could side-step tax liability by signing a special agreement with the government. So Helen of Troy’s shareholders were able to avoid paying taxes on the transfer, even though they had helped transfer stock of a domestic corporation to a foreign corporation, which was helping money leave the U.S. tax net. See Hicks, *supra* note 11, at 905; Surdell, *supra* note 66, at 67; and Willard B. Taylor, *Corporate Expatriation—Why Not?* 78 TAXES—TAX MAG. 146, 146-47 (2000) (describing the Helen of Troy corporate inversion and related regulations).

<sup>88</sup> I.R.C. § 332 (2012).

<sup>89</sup> *Id.* § 351 (2012).

<sup>90</sup> *Id.* § 356 (2012).

<sup>91</sup> And to the extent some shareholders ended up owning more than 5%, the government imposed an additional anti-abuse requirement: those shareholders were required to file a gain recognition agreement—an agreement in which the shareholder agrees to recognize some or all of the gain realized on a transfer if certain gain recognition events occur during a certain amount of time following the transfer—in order to avoid taxes. See Surdell, *supra* note 66, at 68-69.

<sup>92</sup> Treas. Reg. § 1.367(a)-3(c) (2014).

<sup>93</sup> *Id.*

(a) own less than 5% of the foreign corporation immediately after the transaction or (b) file a gain recognition agreement.<sup>94</sup>

The fourth requirement, colloquially referred to as the “active trade or business test,” requires that the foreign company (or qualified subsidiary, or qualified partnership) be engaged in an active foreign trade or business outside of the United States for 36 months prior to the transaction, and have no plans to dispose of or discontinue the business.<sup>95</sup> Helen of Troy’s inversion would have been subject to a shareholder-level tax, and Helen of Troy’s newly established subsidiary would not have passed the active trade or business test.<sup>96</sup>

Finally, transactions must pass the “substantiality test.”<sup>97</sup> Broadly speaking, this test requires that the foreign acquirer must be at least as big<sup>98</sup> as the U.S. target company—no foreign minnows swallowing domestic whales, because minnows swallowing whales are presumably doing so for tax reasons.<sup>99</sup>

The government’s tax-based response to Helen of Troy’s corporate inversion was meant to halt inversion activity—a shareholder-level tax was meant to make public-company inversions very unpalatable to shareholders. Other factors may have also contributed to the slow-down in inversions. Previous studies, for instance, have cited increased visibility of inversions in the public eye as a factor. Government action may have also raised the profile of corporate inversions, causing corporations to reconsider whether inversions are worth the potential backlash from shareholders, customers, and the public.<sup>100</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> This test is considered the most complicated factor—what qualifies as a “qualified subsidiary,” “qualified partnership,” and “active trade or business outside of the United States” are all carefully defined in the regulation. Recall that Helen of Troy’s corporate inversion skirted section 1248(i), enacted in response to McDermott’s corporate inversion, by setting up a brand-new Bermudan subsidiary with no earnings and no profits. *See generally* Treas. Reg. §§ 1.367(a)-3(c)(3)(i).

<sup>97</sup> *Id.*; Hicks, *supra* note 11, at 906.

<sup>98</sup> Size is based on fair market value, which is not carefully defined.

<sup>99</sup> Hicks, *supra* note 11, at 906.

<sup>100</sup> *See* Kirsch, *supra* note 28, at 520-24. Note that after Section 367(a), a few self-inversions went through, using exchangeable shares as a way to defer immediate payment of the shareholder-level tax. Hicks, *supra* note 11, at 907. Exchangeable shares are shares of a corporation with economic entitlements that closely resemble those of another company. For instance, when Triton Energy Corp. decided to invert to the Caymans in 1996, Triton Energy bought its shareholders’ shares, and gave shareholders a choice of what they could receive in return: (1) Class-A ordinary shares of the newly formed Triton Cayman or (2) an “equity unit” that consisted of a bit of Triton Delaware preferred stock plus one Class B share of Triton Cayman. Both options were of approximately equal value. U.S. shareholders who chose the first option would have their gains taxed (i.e., Section 367 would apply), but U.S. shareholders who chose the second option would be able to defer a substantial portion of their taxable

### C. *The Third Generation*

The third generation of corporate inversions began in the early 2000s with the self-inversions of Ingersoll-Rand, Nabors Industries, Noble Drilling, and Cooper Industries, and ended with Stanley Works' announced-but-canceled inversion in 2002.

Once again, companies chased the promise of tax savings. Houston-headquartered, Ohio-incorporated Cooper Industries, Inc., which announced its inversion to Bermuda in 2002, was one such company.<sup>101</sup> Brothers Charles and Elias Cooper founded Cooper Industries in Ohio in 1833 and sold plows, hog troughs, kettles, and stoves.<sup>102</sup> By 2002, Cooper Industries had over \$4.2 billion in annual revenues<sup>103</sup> and employed over 30,000 people.<sup>104</sup>

Like its corporate inversion predecessors, Cooper Industries cited tax reasons for its corporate inversion: it noted that inverting would improve its global tax position and reduce its effective tax rate from about 35% to 18-23%.<sup>105</sup> In order to invert to Bermuda, Cooper Industries formed a new Bermudan subsidiary, and under it, a domestic subsidiary corporation, U.S. MergerCo. U.S. MergerCo merged into Cooper Industries, and Cooper Industries survived. In the merger process, Cooper Industries's public shareholders received stock in the Bermudan subsidiary, and shares of U.S. MergerCo's stock previously held by the Bermudan subsidiary were converted into shares of Cooper Industries. After the transactions were completed, the public owned the Bermudan company, and the Bermudan company owned Cooper Industries.<sup>106</sup>

Several factors may have worked together to account for the increase in popularity of inversions. First, the early 2000s' dip in stock prices<sup>107</sup> simultaneously made corporate inversions cheaper for shareholders and more important for corporate managers. From the shareholders' perspective, lower stock prices meant that the shareholder-level tax was a smaller

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gain by retaining interest in the U.S. company. See Triton Energy Corp., Definitive Proxy Statement (Form 14A) at 2, 35-36 (Feb. 23, 1996).

<sup>101</sup> Cooper Indus., Ltd., Registration Statement (Form S-4), at 2 (Jun. 11, 2001) (offering securities in connection with the formation of a holding company).

<sup>102</sup> *History*, COOPER INDUS. PLC, <http://www1.cooperindustries.com/company/company-history.html> (last visited Jan. 31, 2015) (providing information on the history of Cooper Industries).

<sup>103</sup> Cooper Indus., Inc., Annual Report (Form 10-K), at 11 (Feb. 20, 2002).

<sup>104</sup> *Id.* at 3.

<sup>105</sup> Cooper Indus., Inc., Registration Statement (Form S-4), *supra* note 101, at 13-14.

<sup>106</sup> Surdell, *supra* note 66, at 73-74.

<sup>107</sup> Hicks, *supra* note 11, at 907.

amount in absolute terms (or even zero, for those shareholders who had losses).<sup>108</sup> Many shareholders were also tax-exempt or tax-indifferent. At the same time, managers felt pressured to increase shareholder value, and inversions could bump up stock prices.<sup>109</sup> Transactional innovation also played a role. Although transfer pricing and intercompany debt helped make second-generation corporate inversions worthwhile, empirical studies show that third-generation corporate inversions really made use of intercompany debt to strip earnings from the United States. In practice, this meant that the new foreign parent extended an intercompany loan to its U.S. subsidiary. The U.S. subsidiary then deducted interest paid on the loan from its taxable income in the United States. Meanwhile, the foreign parent's corresponding interest income was realized abroad, where it was taxed at a low or zero foreign rate and subject to no U.S. tax.<sup>110</sup>

Several public companies announced corporate inversions between 2000 and 2002, but this third generation of corporate inversions abruptly stopped in 2002, a few months after Connecticut-incorporated hand-tool company Stanley Works announced in February of 2002 its plan to invert to Bermuda. Unlike many prior inverters, Stanley Works was an iconic American company and a household name—today, it is known as Stanley Black & Decker, and its products line the aisles of home-improvement stores. After Stanley Works announced its intention to invert, it endured months of press frenzy, public protests at company headquarters, and political pressure to stop the inversion. Finally, in August, before a final shareholder vote<sup>111</sup> could be held, Stanley Works withdrew its inversion plan, stating:

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* In their 2002 empirical study, however, Desai and Hines found that corporate inversion announcements do not always drive up stock prices. They studied 19 companies that made corporate inversion announcements between 1993 and 2002, and found that only eight of the 19 companies had positive abnormal returns on stock price the day after the announcement, and only 10 had positive abnormal returns on stock price during the five-day window around the time of the corporate inversion announcement. They conclude that “[c]learly, the stock market is concerned in many cases either that the costs of inverting exceed the benefits under current law, or that future tax or regulatory changes might reduce the benefits of inverting.” Desai & Hines, *supra* note 12, at 430.

<sup>110</sup> See U.S. DEPT. OF THE TREASURY, REPORT TO CONGRESS ON EARNINGS STRIPPING, TRANSFER PRICING AND U.S. INCOME TAX TREATIES 2 (Nov. 28, 2007), <http://www.treasury.gov/resource-center/tax-policy/Documents/ajca2007.pdf>; Seida & Wempe, *supra* note 39, at 806-07 (finding that for several inverters that inverted in 2001 and 2002, intercompany debt played a big role in U.S. earnings stripping and contributed to lowered effective tax rates); Surdell, *supra* note 66, at 73.

<sup>111</sup> Stanley Works' shareholders initially approved the transaction in May. However, Stanley Works' board of directors voided the first vote, citing shareholder

We [Stanley Works] have been asked by the Congressional leadership on both sides of the aisle to support their efforts toward rectifying this situation by enacting legislation that will create a level playing field for companies incorporated in the U.S. We have honored their request, and the ball is now in their court. We sincerely hope that Congress will agree to a solution. Ignoring this problem will not make it go away, but can only accelerate the trend of fewer U.S. headquartered companies.<sup>112</sup>

In its cancelation announcement, Stanley Works called the United States's tax system "archaic" and accused the system of "putting U.S. companies that compete globally in an untenable position."<sup>113</sup>

As it did in response to previous generations of inversions, the government changed the rules in 2004 to disincentivize inversions. Congress added Section 7874 to the Code as part of the American Jobs Creation Act of 2004, making it harder for domestic companies to invert.<sup>114</sup> Under Section 7874, a domestic corporation that engages in a cross-border business combination and that attempts to end up incorporated in a foreign jurisdiction must make sure that after the acquisition, less than 60% of the combined company's stock is owned by the former shareholders of the domestic company by reason of their holding stock in the domestic company.<sup>115</sup> In inversion parlance,

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confusion about the voting procedures. *See* Stanley Works, Prospectus (Form 425) (May 13, 2002) (canceling the initial shareholder vote while citing shareholder confusion about procedures). There was supposed to be a second shareholder vote, but the corporate inversion plan was aborted before it could take place. Dan Ackman, *Stanley Works Stays Home*, FORBES (Aug. 2, 2002, 8:50 AM), <http://www.forbes.com/2002/08/02/0802topnews.html>.

<sup>112</sup> Stanley Works, Current Report (Form 8-K) (Aug. 1, 2002) (announcing the cancellation of its previously-announced plan to invert).

<sup>113</sup> *Id.*

<sup>114</sup> American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004).

<sup>115</sup> Section 7874 applies when all three of the following criteria are met:

- (1) A foreign corporation acquires a U.S. corporation or partnership (often called the "acquisition test"); and
- (2) after the acquisition, at least 60% of the foreign corporation's stock is owned by the former shareholders of the U.S. company by reason of their holding stock in the U.S. company (the "ownership test"); and
- (3) the corporate group controlled by the foreign corporation does not have business activities in the foreign corporation's country of incorporation when compared to the total business activities of the group worldwide (the "substantial business activities test." Note that this analysis is done on the activities of the corporate group the year before the acquisition).

*See* 26 U.S.C. § 7874 (2012).



a company that has less than 60% shareholder overlap is said to have less than 60% “ownership continuity.”<sup>116</sup>

Ownership continuity triggers two levels of penalties for an inverting corporation.<sup>117</sup> Inverting corporations with more than 80% ownership continuity will continue to be taxed as domestic corporations. If ownership continuity is between 60% and 80%, Section 7874 imposes a gain recognition requirement, which restricts the inverter in some ways—for instance, by limiting the inverter’s use of certain tax attributes to offset gains in the years after the inversion.<sup>118</sup> In addition, the inverting corporation’s ability to use net operating losses to reduce taxation of its inversion gain is limited.<sup>119</sup>

The exception to ownership continuity is the “substantial business activities test”: if a corporation has substantial business operations in its new foreign jurisdiction, it can invert despite substantial ownership continuity.<sup>120</sup> A corporation has substantial business activities in a country to which it is moving its incorporation jurisdiction if it meets the “25% test”:<sup>121</sup>

- at least 25% of its employees are located in the new foreign jurisdiction,
- at least 25% of its employee compensation is attributable to the new foreign jurisdiction,
- at least 25% of the multinational group’s asset value is located in that country, and
- at least 25% of the multinational group’s total income is derived in that country.<sup>122</sup>

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<sup>116</sup> See Hal Hicks & Oshan James, *Select Corporate Migration and Combination Considerations in an Ever Changing Environment*, INT’L TAX J., May-June 2014, at 25, 30 (2014).

<sup>117</sup> See Surdell, *supra* note 66, at 74; Jefferson P. VanderWolk, *Inversions Under 7874 of the Internal Revenue Code: Flawed Legislation, Flawed Guidance*, 30 NW. J. INT’L L. & BUS. 699, 704 (2010).

<sup>118</sup> Surdell, *supra* note 66, at 74-75; see also 26 U.S.C. § 7874(d)(2).

<sup>119</sup> VanderWolk, *supra* note 117, at 704 n.24.

<sup>120</sup> This tightening of the rule may have been in response to a number of self-inversions, including Aon Corp’s and Rowan Companies Inc.’s, that relied on a previous (and more flexible) “facts and circumstances” test. See Bret Wells, *Cant and the Inconvenient Truth About Corporate Inversions*, 136 TAX NOTES 429 (July 2012) (discussing the facts and circumstances test for the substantial business activities test under Section 7874).

<sup>121</sup> See Surdell, *supra* note 66, at 78-79; Treas. Reg. § 1.7874-3T(a)-(b)(3) (2013).

<sup>122</sup> Surdell, *supra* note 66, at 78-79; Treas. Reg. § 1.7874-3T(a)-(b)(3) (2013) (establishing the 25% bright-line test).

#### D. The Fourth Generation

Although corporate inversion activity slowed for some time after Section 7874, it has picked up again in the last half-decade. Because inverting companies have a hard time escaping Section 7874's applicability through the 25% substantial business activities test,<sup>123</sup> many fourth-generation inverters have focused on making sure that there is not too much ownership continuity between the old U.S. company and the new combined company. In order to have low ownership continuity, fourth-generation corporate inversions are accomplished through business combinations with non-U.S. companies.<sup>124</sup>

Actavis's corporate inversion is a good case study, as it is fairly representative of the current generation of inversions. In May of 2013, Actavis, Inc., a Nevada-incorporated company headquartered in New Jersey, announced its intention to purchase Ireland's Warner Chilcott plc in a stock-for-stock transaction valued at about \$8.5 billion.<sup>125</sup>

To complete the transaction, Actavis formed an Irish company (New Actavis) and a number of wholly owned subsidiaries under New Actavis.<sup>126</sup> Then, Actavis merged with and into one of New Actavis's wholly owned subsidiaries, cancelling Actavis's shares and giving its shareholders the right to receive shares of New Actavis.<sup>127</sup> At the same time, New Actavis acquired Warner Chilcott. In the process, Warner Chilcott's shares were also canceled and Warner Chilcott shareholders received the right to a fraction of a New Actavis share for each Warner Chilcott share they previously held.<sup>128</sup> At the end of the transaction, New Actavis was the parent company of both Actavis and Warner Chilcott. Former Actavis shareholders owned 77% of the New Actavis shares, and former

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<sup>123</sup> Even some companies that have significant operations abroad may have difficulty meeting the 25% bright-line rule because the assets of the post-combination company do not include intangible assets in the calculation. Thus, companies with large amounts of assets abroad—but largely comprised of intangible assets—will have trouble meeting the 25% bright-line rule. Surdell, *supra* note 66, at 79.

<sup>124</sup> *Id.*

<sup>125</sup> Press Release, Actavis, Inc., Actavis to Acquire Warner Chilcott to Create Premier \$11 Billion Revenue Global Specialty Pharmaceutical Company (May 20, 2013), available at <http://ir.actavis.com/phoenix.zhtml?c=65778&p=irol-newsarticle&ID=1821961>; Actavis, Inc., Current Report (Form 8-K) (Oct. 1, 2013) (noting Actavis's place of incorporation and headquarters location).

<sup>126</sup> Actavis, Inc., Prospectus (Form 424b3) 12-15 (Jul. 31, 2013) (describing and illustrating the pre- and post-transaction structures of Actavis, New Actavis, and Warner Chilcott).

<sup>127</sup> *Id.* at 14.

<sup>128</sup> *Id.* at 13-14.

Warner Chilcott shareholders owned 23% of the New Actavis shares. Because ownership continuity between former Actavis shareholders and New Actavis shareholders was only 77% (and thus did not reach 80%), Actavis successfully inverted out of the United States, although it was still subject to the tightened rules because ownership continuity exceeded 60%.<sup>129</sup>

Like previous generations of corporate inverters, the current generation of inverters cites tax savings, including savings realized by accessing trapped cash, as a key reason for inverting. In public filings, Actavis noted that inverting would lower its effective tax rate from 28% to 17%.<sup>130</sup> Actavis CEO Paul Bisaro also told investors that Actavis expected “substantial operational synergies and some tax synergies and overall tax structure benefits,”<sup>131</sup> and that the acquisition would

allow us to use our balance sheet and our tax structure to go and get many more of those assets that we were handicapped trying to get before . . . . So if we’re looking now at assets that are overseas and we can bring to the U.S., further enhancing our pipeline, we now have a vehicle to do that . . . .<sup>132</sup>

In other words, Actavis’s corporate inversion was motivated, in part, by the desire to access cash trapped overseas.

Likewise, when Minnesota-based Medtronic, Inc. announced its decision to invert to Ireland by acquiring Irish company Covidien plc., commentators emphasized that the deal was driven by Medtronic’s desire to “bring the amount of [its] ‘trapped’ offshore cash down to about 40 percent of its total cash, from 60 percent as a stand-alone firm.”<sup>133</sup> U.S. companies

<sup>129</sup> *Id.* at 15.

<sup>130</sup> *Id.* at 70 (noting that “the expected combined company effective non-GAAP tax rate of approximately 17%, as opposed to the current non-GAAP effective tax rate of Actavis of 28%”). Note that Actavis’s pre-inversion corporate tax rate was already lower than the oft-quoted 35% U.S. corporate tax rate, because it had already engaged in prior transactions that lowered its tax rate.

<sup>131</sup> Actavis, Inc., Prospectus (Form 425) 2 (May 20, 2013). In response to a question asked during an investor call in conjunction with the deal, Actavis CEO Paul Bisaro stated that, “I think I again would come back to the fact that as we looked at the strategic value of Warner Chilcott in Actavis’ hands it became a compelling story for us. It was compelling from a commercial perspective.” In the same response, Bisaro stated, “[a]nd then, finally, we will receive the benefit, the combined company will receive the benefit of a better overall tax structure . . . .” *Id.* at 15.

<sup>132</sup> *Id.* at 15. In response to a question asked during an investor call, Bisaro said that the Warner Chilcott acquisition “was the perfect opportunity for that for all the reasons we’ve already discussed and had the added benefit of being able to deal with something that was always troubling to me, which was the tax structure, and I think we’ve really found a way to deal with that and make us competitive in a global environment.” *Id.* at 20.

<sup>133</sup> Gelles, *supra* note 34.

with a lot of intellectual property, especially, have moved their intellectual property abroad so as to avoid paying high U.S. taxes on the income generated by that intellectual property.<sup>134</sup> By inverting, many companies are able to access trapped cash that they were otherwise unwilling to bring into the United States.

Inverting companies have asserted that tax reforms abroad play a role in driving recent inversions. For instance, the United Kingdom recently adopted tax reforms, including lower corporate tax rates, in part because many U.K. companies were inverting to tax-friendly Ireland.<sup>135</sup> When Ensco International Incorporated left the United States for the United Kingdom in 2010, it noted that

the U.K. has taken steps to decrease uncertainty about its international tax regime by proposing the liberalization of certain of its international tax provisions to better harmonize them with the foreign dividend exemption system recently implemented in the U.K.<sup>136</sup>

Recent inversions may also be driven in part by the fact that inversions to Europe may be easier to sell to the public and shareholders than inversions to traditional tax havens. Stanley Works's corporate inversion to a traditional tax haven played a big role in drowning its inversion and spurred the addition of Section 7874. Inverting to jurisdictions that are not considered tax havens means that corporations can avoid some public stigma.

President Obama and both houses of Congress proposed anti-inversion actions in 2014. President Obama's 2015 budget

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<sup>134</sup> Jonathan D. Rockoff, *Why Pharma is Flocking to Inversions: Deals Enable Companies to Take Advantage of Lower Tax Rates Overseas*, WALL ST. J. (Jul. 14, 2014, 1:53 PM), <http://online.wsj.com/articles/why-pharma-is-flocking-to-inversions-1405360384> ("Even companies that haven't done inversions have used other methods to cut their taxes. Biogen Idec, Celgene Corp. and Gilead Sciences Inc. have 'domiciled' the intellectual property for various drugs outside the U.S. to lower the taxes they pay on sales, according to RBC Capital Markets").

<sup>135</sup> Steven Surdell discusses the "liberalization" that Ensco mentions in its prospectus. Specifically, after seeing several prominent U.K.-incorporated companies reincorporate in tax-friendly Ireland, the U.K. reformed its tax system to lower corporate tax rates and to more closely resemble a territorial system. Surdell notes that

[t]he activity across the pond was not lost on U.S. multinationals with large U.K. operations. If the U.K. reformed its international tax system to resemble a territorial system and also lowered its corporate rate, U.S. incorporated multinationals could consider unilateral inversions to the U.K. rather than to traditional "haven" jurisdictions like Bermuda or the Cayman Islands.

Surdell, *supra* note 66, at 76.

<sup>136</sup> ENSCO International Incorporated, Proxy Statement (Schedule 14A) 13, 29 (Nov. 20, 2009).

proposal, introduced in March 2014, included a provision to strengthen current anti-inversion rules. Under Section 7874, if there is ownership continuity of 60% or more, tax penalties apply. If there is ownership continuity of 80% or more, the inverting company will not be treated as a foreign company at all after its corporate inversion—the United States will tax it as though it had never left the country. The budget proposes doing away with the 60% to 80% threshold and replacing both with a 50% threshold.<sup>137</sup> Thus, an attempted inverter will still be taxed as a U.S. corporation if there is ownership continuity of 50% or more.

In addition, regardless of the level of ownership continuity, “an inversion transaction [will occur] if the affiliated group that includes the foreign acquiring corporation has substantial business activities in the United States and the foreign acquiring corporation is primarily managed and controlled in the United States.”<sup>138</sup> In other words, if a big Irish corporation gobbles up a smaller domestic corporation and the resulting company has substantial business activities in the United States, and the foreign corporation is “managed and controlled” in the United States, this transaction will be considered a corporate inversion, regardless of shareholder continuity. Finally, the budget proposes an amendment to Section 7874 so that a corporate inversion could occur if there is an acquisition of substantially all of the assets of a trade or business of a domestic partnership.<sup>139</sup>

Senator Carl Levin’s Stop Corporate Inversions Act of 2014 largely mirrors the budget’s proposals,<sup>140</sup> but sunsets in two years, giving Congress two years to consider comprehensive tax reform.<sup>141</sup> Senator Levin’s bill proposes to lower the ownership continuity threshold to 50%.<sup>142</sup> It also quantifies the “management and control” sentiment of the budget proposal: a company will continue to be treated as a U.S. company for tax reasons if “either 25% of its employees or sales or assets are located in the United States.”<sup>143</sup> On the same day that Senator Levin introduced the bill in the Senate, his brother, Congressman Sander Levin, introduced a companion bill in the House of Representatives.<sup>144</sup>

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<sup>137</sup> TREAS., GENERAL EXPLANATIONS, *supra* note 18, at 64-65.

<sup>138</sup> *Id.* at 65.

<sup>139</sup> *Id.*

<sup>140</sup> Stop Corporate Inversions Act of 2014, S. 2360, 113th Cong. (2014).

<sup>141</sup> See Press Release, Sen. Ben Cardin, *supra* note 45.

<sup>142</sup> Stop Corporate Inversions Act of 2014, S. 2360.

<sup>143</sup> See Press Release, Sen. Ben Cardin, *supra* note 45.

<sup>144</sup> Stop Corporate Inversions Act of 2014, *supra* note 44.

After the Levins' anti-inversion proposals failed to gain traction, both the executive and legislative branches took further action. Treasury Secretary Jack Lew sent a letter to the House of Representatives, urging anti-inversion legislation and corporate tax reform.<sup>145</sup> Shortly thereafter, Senator Levin co-sponsored a bill with Senator Dick Durbin that would prevent inverted corporations from obtaining federal government contracts.<sup>146</sup>

There were also several proposals targeting trapped cash and earnings stripping. Senators Harry Reid and Rand Paul have also proposed legislation that may deal with the trapped cash problem. They have been "quietly pressing for a one-time tax 'holiday'—a special and lucrative tax deduction—to lure multinational corporations to bring profits home from overseas, producing a sudden windfall."<sup>147</sup> This may also reduce some corporations' incentives to invert, at least in the short term.

Former Treasury official Stephen Shay has also urged regulatory action to reduce the incentive for corporations to invert. Shay argues that the Treasury Secretary has "direct and powerful regulatory authority to reclassify debt as equity and thereby transform a deductible interest payment into a nondeductible dividend," and notes that under Section 385 of the Code, "it is possible and appropriate to identify cases in which the use of related-party debt exceeds thresholds that should be acceptable in a particular case."<sup>148</sup> Shay proposes regulations that would cause inverted corporations to reclassify as equity any intercompany debt issued to a related foreign entity that is not a CFC, up to a certain amount.<sup>149</sup> Since much of the tax-saving value of corporate inversions is derived from earnings stripping by injecting intercompany debt, removing the benefit of that interest deduction takes much of the shine off of inverting. By way of example, Shay notes that, had a rumored Walgreens inversion been completed, Walgreens could have exempted 50% or more of its taxable income from U.S. income tax by injecting intercompany debt, leading to a tax savings of \$783 million.<sup>150</sup> Treasury action reclassifying intercompany debt as equity, however, would have reduced

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<sup>145</sup> See *supra* note 49, and accompanying text.

<sup>146</sup> See Office of Congresswoman Rosa DeLauro, *supra* note 51, and accompanying text.

<sup>147</sup> Weisman, *supra* note 52.

<sup>148</sup> Shay, *supra* note 53, at 474-75 (arguing for regulatory action to reduce the benefits of corporate inversions).

<sup>149</sup> *Id.* at 475.

<sup>150</sup> Shay, *supra* note 53, at 474.

that savings “by hundreds of millions of dollars . . . chang[ing] the calculus of a decision to expatriate.”<sup>151</sup>

Like Shay’s proposal, Senator Charles Schumer’s proposal also tackles the earnings stripping problem by limiting interest deductions.<sup>152</sup> In addition to other technical aspects, Senator Schumer’s proposal reduces an inverted corporation’s permitted net interest expense from 50% to 25% of its net adjusted taxable income. The proposal also repeals the corporation’s ability to carry forward excess interest deductions into future years, which is currently allowed. Additionally, an inverted corporation will need to obtain IRS pre-clearance on transactions with its parent company for 10 years after the inversion, which would possibly allow the IRS to limit the amount of intercompany debt injected, and therefore the amount of earnings stripping that occurs.<sup>153</sup>

As with previous generations of inversions, the government continues to wage war on tax grounds. Once again, corporations have stated that they invert for tax reasons: to lower tax rates, to access trapped cash, and to inject intercompany debt in order to further reduce tax burdens. And, as before, the government has responded on tax grounds: it has proposed tightened tax-based restrictions and introduced the “management and control” concept in order to make it even harder for corporations to escape the U.S. tax net.

From the perspective of both parties, the war is a zero-sum game. For corporations, increasing global competition against companies that have smaller tax burdens makes inverting out of the United States an attractive way to lower taxes and access cash trapped overseas. For the government, every dollar of a corporation’s tax savings is a corresponding loss in government tax revenue. As a result, the government has implemented a series of policies that lower the tax benefits of inverting and make inverting complicated and difficult. But the Code is complicated, and corporations are nimble. Whenever a new generation of anti-inversion policy is enacted, it is only a matter of time before corporations find a way to invert. And while comprehensive tax-system overhauls like the United Kingdom’s—including a move to a territorial system or

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<sup>151</sup> *Id.* at 475.

<sup>152</sup> Rubin, *supra* note 55.

<sup>153</sup> Siobhan Hughes, *Q&A: Schumer’s Proposal to Strip Benefits of Corporate Earnings Stripping*, WALL ST. J. (Aug. 14, 2014, 4:50 PM), <http://blogs.wsj.com/washwire/2014/08/14/qa-schumers-proposal-to-strip-benefits-of-corporate-earnings-stripping/> (reporting on Senator Schumer’s proposal to cap interest deductions).

lowering the corporate tax—have been proposed in the United States and may work in theory, they may be too politically fraught to be practicable or realistic. In the best of times, a comprehensive overhaul of the corporate tax system requires Herculean Congressional effort. And with today's gridlocked Congress, many commentators have noted that even the Levin brothers' relatively middle-of-the-road proposal is unlikely to find support on both sides of the political aisle.<sup>154</sup>

### III. CORPORATE INVERSIONS' HIDDEN COSTS

The reality that corporations can use inversions to save on taxes changes corporate behavior, which has non-tax consequences for the corporation. Inversions also cause negative externalities—costs borne by the public. These consequences for the corporation and for the public are exacerbated by the complexity of modern business-combination inversions. This Part begins to consider some of the hidden costs of inversions both for inverting corporations and for the public. In doing so, this Part reveals a range of under-considered factors that are relevant to the inversion discussion and begins to consider whether and to what extent these factors should be considered in future policy decisions.

Ultimately, while inversions create costs for corporations, the non-tax hidden costs may not, for each individual inverter, be sufficient to outweigh an inversion's tax benefits. However, the cumulative costs of inversions for the public are worthy of further research.

#### A. *Costs to the Inverting Corporation*

Tax laws—like all laws and regulations—often have unanticipated consequences. In this case, the current corporate-inversion-related legal and regulatory landscape, combined with

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<sup>154</sup> See Wendy Diller, *Congress And Tax Inversions: A Wall Streeter's Take On 2014*, FORBES (Jul. 16, 2014, 6:23 PM), <http://www.forbes.com/sites/wendydiller/2014/07/16/congress-and-tax-inversions-a-wall-streeters-take-on-2014/> (opining that "hardliners" are unlikely to support the Levins' proposal, instead preferring to hold out and pass comprehensive tax reform when there is a Republican majority in both houses of Congress); Gelles, *New Legislation Targets Inversions From Different Angle*, *supra* note 50 (noting that the Levins' bill "failed to gain traction"); Danny Vinik, *U.S. Corporations Are Exploiting a Huge Tax Loophole, but The GOP Doesn't Want to Close It*, NEW REPUBLIC (May 21, 2014), <http://www.newrepublic.com/article/117843/levin-brothers-want-end-tax-inversion-gop-refuses> (opining that although the Levins' bill "has 13 Democratic co-sponsors in the Senate and nine in the House, [it] is unlikely to find much support among Republicans").



the corporate inversions that are executed because of it, creates costs for inverting corporations. This sub-Part unpacks some of the ways that inversions and inversion policy can change corporate behavior, revealing factors that are under-discussed. While these non-tax factors may not be sufficient to outweigh inversions's tax benefits, they are worth discussing and certainly worthy of consideration by potential inverters.

### 1. Transition Costs

Currently, corporations can leave the United States for lower-tax jurisdictions by inverting. For some corporations, a desire to lower their tax bills may be the primary driver of a reincorporation decision. The act of reincorporation abroad, however, comes with transition costs.

These transition costs include the costs associated with learning a new corporate law and corporate governance regime. A corporation that has spent decades incorporated in Delaware is already familiar with the nuances of Delaware corporate law. A corporation that inverts to Ireland or the United Kingdom incurs the cost of learning a new body of law, and the differences may be substantial.

In the everyday governance context, for instance, there are material differences between dividend payout rules in Delaware and in Ireland. Under Delaware law, a corporation can pay out dividends if it has surplus—a fairly squishy concept that allows a corporation a great deal of leeway in dividend payments.<sup>155</sup> In contrast, under Irish law, dividend payouts are based on the concept of distributable reserves.<sup>156</sup> Capital reduction is one way to create distributable reserves, but capital reduction requires shareholder approval and approval by the Irish High Court.<sup>157</sup> While this approval may be a rubber-stamp process, it is still an additional restriction to dividend payments that is not imposed on a Delaware corporation.

Shareholder derivative suits are also handled substantially differently in the United Kingdom. Shareholder derivative suits—lawsuits in which a corporation's shareholder sues (often a corporation's management) on behalf of a

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<sup>155</sup> DEL. CODE ANN. tit. 8 § 170 (providing for the distribution of dividends of Delaware corporations).

<sup>156</sup> Companies (Amendment) Act of 1983, § 45 (1983) (providing restrictions of profits and assets).

<sup>157</sup> Companies Act of 1963, § 74 (1963) (describing the process by which the court approves a capital reduction).

corporation—are common in the United States.<sup>158</sup> In the United Kingdom, there is relatively limited access to such suits. Until the passage of the Companies Act 2006, shareholder derivative suits were governed by complex common law and were therefore rare.<sup>159</sup> The Companies Act 2006 established a new two-stage procedure to obtain court permission to continue derivative actions, eradicating the common law procedures for bringing a shareholder derivative suit. This change was thought to make shareholder derivative suits slightly easier to sustain,<sup>160</sup> although the two-stage court-permission process is still cumbersome relative to the United States's process. In the United States, a shareholder need only first demand that management bring a suit, and can then sue if management refuses.<sup>161</sup> Evidence from the years directly after the U.K. laws went into effect also did not indicate a great uptick in the number of shareholder derivative suit opinions reported.<sup>162</sup> The United Kingdom's relatively cumbersome shareholder derivative suit rules, combined with the relatively low numbers of derivative suits reported, suggests that shareholders of corporations that have inverted to the United Kingdom may have less access to derivative suits than if the corporations had stayed in the United States. On the other hand, evidence also suggests that many U.S. derivative suits are dismissed early, and a very small percentage of these suits—around 1%, or much lower, depending on the type of company involved—generated a judicial opinion.<sup>163</sup> Thus, while shareholders may find it less cumbersome to file derivative suits in the United States, the shareholder's probability of litigating a case to opinion-generation in the United States is also very low.

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<sup>158</sup> Ann M. Scarlett, *Investors Beware: Assessing Shareholder Derivative Litigation in India and China*, 33 U. PA. J. INT'L L. 173, 178-79 (discussing the frequent use of shareholder derivative suits in the United States).

<sup>159</sup> See SLAUGHTER & MAY, COMPANIES ACT 2006: DIRECTORS' DUTIES, DERIVATIVE ACTIONS AND OTHER MISCELLANEOUS PROVISIONS (June 2007), available at [http://www.slaughterandmay.com/media/39392/companies\\_act\\_2006\\_-\\_directors\\_duties\\_derivative\\_actions.pdf](http://www.slaughterandmay.com/media/39392/companies_act_2006_-_directors_duties_derivative_actions.pdf) (describing provisions of the Companies Act 2006).

<sup>160</sup> John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J. EMPIRICAL L. STUD. 687, 695 (2009).

<sup>161</sup> Thomas P. Kinney, *Shareholder Derivative Suits: Demand and Futility Where the Board Fails to Stop Wrongdoers*, 78 MARQ. L. REV. 172, 173 (1994).

<sup>162</sup> See STUART PICKFORD & RANI MINA, MAYER BROWN, DERIVATIVE CLAIMS IN THE US AND THE UK: THE STORY SO FAR (Apr. 2009), available at [http://www.mayerbrown.com/files/Publication/d44e695d-fca6-422e-bf0c-73918a8abff3/Presentation/PublicationAttachment/731b55c0-0c92-42b4-9e72-84f930d78b77/ART\\_PICKFORD\\_MINA\\_DERIVATIVE\\_CLAIMS\\_APR09.PDF](http://www.mayerbrown.com/files/Publication/d44e695d-fca6-422e-bf0c-73918a8abff3/Presentation/PublicationAttachment/731b55c0-0c92-42b4-9e72-84f930d78b77/ART_PICKFORD_MINA_DERIVATIVE_CLAIMS_APR09.PDF).

<sup>163</sup> Armour, et al., *supra* note 160, at 706.

There are also substantial differences between U.S. law and foreign law in the mergers and acquisitions context, and, specifically, in the takeover protection and deal protection contexts, which can add to deal cost and deal uncertainty.

Many U.S. states, including Delaware, have long allowed companies to adopt takeover defenses, like stockholder rights plans (commonly called poison pills).<sup>164</sup> A typical stockholder rights plan may be triggered if a certain event, like a hostile takeover, occurs—for example, when one shareholder buys up 30% of a company's shares. When the plan is triggered, the other shareholders will have the right to buy newly issued shares of the company at a discount, which dilutes the 30% holder's shares and makes the takeover more expensive. In *Moran v. Household International*,<sup>165</sup> the Delaware Supreme Court upheld the validity of a stockholder rights plan as a takeover defense mechanism. The Delaware Court of Chancery has also recognized stockholder rights plans as acceptable responses to activist shareholder threats.<sup>166</sup> In contrast, both Ireland and Britain generally prohibit takeover defenses and expect companies to “fight these bids by lobbying shareholders directly.”<sup>167</sup> Under both Irish and British takeover rules, subject to certain exceptions, a board of directors cannot take any action that might “frustrate” an offer for shares once the board of directors has received an approach that may lead to an offer or has reason to believe that an offer is or may be imminent.<sup>168</sup> And while some Irish corporations listed in the United States

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<sup>164</sup> Steven Davidoff Solomon, *Elan Finds Creative 'Poison Pill' to Defend Against a Hostile Bid*, N.Y. TIMES DEALBOOK (Jun. 6, 2013, 6:57 PM), <http://dealbook.nytimes.com/2013/06/06/elan-finds-creative-poison-pill-to-defend-against-a-hostile-bid/> (noting that “the states where American companies are organized freely allow companies to adopt takeover defenses, like a poison pill,” and that “Ireland, like Britain, takes a different approach. Takeover defenses are generally prohibited. Instead, companies are exposed to a hostile takeover and are forced to fight these bids by lobbying shareholders directly”).

<sup>165</sup> 500 A.2d 1346 (Del. 1985) (holding that Household's rights plan was a legitimate exercise of business judgment by the company).

<sup>166</sup> *Third Point LLC v. Ruprecht*, No. 9469-VCP, 2014 WL 1922029, at \*1 (Del. Ch. May 2, 2014) (refusing to enjoin Sotheby's annual meeting based on claims from activist Third Point that Sotheby's board breached its fiduciary duties by adopting a shareholder rights plan).

<sup>167</sup> Davidoff Solomon, *supra* note 164.

<sup>168</sup> THE PANEL ON TAKEOVERS AND MERGERS, THE CITY CODE ON TAKEOVERS AND MERGERS, rule 21 (11th ed., 2013), available at <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf> (providing rules that govern takeovers and mergers in the United Kingdom); IRISH TAKEOVER PANEL, IRISH TAKEOVER PANEL ACT, 1997: TAKEOVER RULES AND SUBSTANTIAL ACQUISITION RULES, rule 21 (2013), available at <http://irishtakeoverpanel.ie/wp-content/uploads/2014/01/ITP-Takeover-Rules.pdf> (providing rules that govern takeovers and substantial acquisitions in Ireland).

have adopted shareholder rights plans, the validity of these plans has yet to be tested in Irish court.<sup>169</sup>

Break-up fees are also handled differently in the United States than in the United Kingdom and Ireland. A break-up fee is a fee that a target company pays to a buyer if the deal is canceled under certain circumstances specified in the acquisition agreement.<sup>170</sup> For instance, if a topping bidder offers a larger sum to the target company and causes the target to terminate a previous agreement, the target will need to pay the previous buyer a break-up fee. In practice, the break-up fee increases the cost of the deal for the topping bidder, since the topping bidder will need to cover the target's payout of the break-up fee—this provides a level of deal protection to the original buyer.<sup>171</sup> In Delaware, there is no bright-line rule about what size break-up fee is reasonable, but generally, fees in the 3% to 4% range have passed muster.<sup>172</sup> Both British and Irish takeover rules are stricter about the use of break-up fees. British takeover rules specify that a break-up fee needs to be approved by the British Takeover Panel and can be used only in limited circumstances.<sup>173</sup> Under Irish takeover rules, break-up fees also require prior approval by the Irish Takeover Panel, and are capped at not more than 1% of the value of the offer.<sup>174</sup> The restriction on break-up fees can reduce deal certainty: for instance, parties subject to British or Irish takeover rules cannot agree to a relatively high break-up fee in order to protect the deal and ensure certainty.

However, while inverting corporations face certain transition costs, even a corporation that does not invert faces potential changes to corporate laws and rules in its jurisdiction of incorporation, which must be learned on an ongoing basis. Moreover, both inverted and non-inverted corporations are able to engage sophisticated counsel or employ relevant experts to help them navigate and comply with local laws. The cost of engaging those experts is likely outweighed by the enormous tax

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<sup>169</sup> Finnerty & McLaughlin, *infra* note 184, at 77.

<sup>170</sup> DAVID FOX ET AL., BREAKUP FEES—PICKING YOUR NUMBER, KIRKLAND & ELLIS LLP (Sep. 6, 2012), *available at* [http://www.kirkland.com/siteFiles/Publications/MAUpdate\\_090612.pdf](http://www.kirkland.com/siteFiles/Publications/MAUpdate_090612.pdf) (describing the range of break-up fees).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (referencing the decisions in *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487 (Del. Ch. 2010), *In re Toys "R" Us S'holder Litig.*, 877 A.2d 975 (Del. Ch. 2005), and *In re Topps Co. S'holders Litig.*, 9216 A.2d 58 (Del. Ch. 2007), which held that 3%, 3.75%, and 4.3% break-up fees were reasonable).

<sup>173</sup> THE PANEL ON TAKEOVERS AND MERGERS, *supra* note 168, at Rule 21.

<sup>174</sup> *Id.*

savings of inverting. Finally, while commentators of previous generations of inversions worried about shareholders' inability to understand inversion-related changes to governance—one commentator noted that “few American shareholders possess a sufficient understanding” of the inverted-to jurisdiction's laws<sup>175</sup>—modern-day shareholders, including institutional and activist investors, are more engaged with governance matters.<sup>176</sup> Thus, the concern that shareholders will be blindsided in the governance context by a move is also mitigated.

## 2. Reduced Local Influence

Another related concern for an inverted corporation is that if the laws of its new jurisdiction change, an inverted corporation may lack the necessary local influence to protect itself. Both management and shareholders may have incomplete pictures of how foreign corporate laws play out. For instance, how do local courts interpret the boundaries of the laws? How do the texts of the laws interact with the local political, economic, or social climate?<sup>177</sup>

Tyco International recently learned that local political and social climate can have a real and potentially negative impact on the corporation, its shareholders, and its managers. Tyco was a U.S. company that inverted to Bermuda in 1997, and later inverted portions of the company from Bermuda to Switzerland.<sup>178</sup> In 2013, Switzerland passed a voter referendum

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<sup>175</sup> Kun, *supra* note 31 at 343-44. Public companies file proxy statements in conjunction with corporate inversions, and these disclosures provide an item-by-item comparison of corporate laws in their original jurisdictions and the foreign jurisdictions to which they are inverting.

<sup>176</sup> See generally Roberta Romano, *Less is More: Making Institutional Investor Activism A Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174 (2001).

<sup>177</sup> Of course, there is an argument to be made that U.S. shareholders have a less-than-complete picture of U.S. corporate laws, too—after all, many shareholders may lack the legal and technical ability to understand U.S. corporate laws and how they interact with the United States's political, economic, and social climate. However, there are many reasons to believe that U.S. shareholders have a better understanding of U.S. law than foreign law. U.S. shareholders are more likely to be invested in more than one U.S. company, so they can at least compare one company's corporate practices against that of another. U.S. shareholders are also exposed regularly to U.S. news, and therefore should have a better understanding of the United States's political, economic, and social climate than they would have of a foreign jurisdiction's. And finally, U.S. shareholders have easier access to U.S. counsel.

<sup>178</sup> Stuart Webber, *Inverted U.S. Firms Relocate Headquarters to Europe*, 64 TAX NOTES INT'L 589, 590-91 (2011) (noting that Tyco inverted to Bermuda in 1997, split into three companies, and then inverted two of them from Bermuda to Switzerland in 2008 and 2009).

called the Minder Initiative.<sup>179</sup> Among other things, the Minder Initiative requires a binding shareholder vote on executive pay for Swiss public companies and bans signing bonuses and golden parachutes, among other forms of compensation.<sup>180</sup> Swiss voters also considered another executive pay proposal: the 1:12 Initiative for Fair Pay, which, if passed, would have capped the salaries of top-level Swiss executives at 12 times the wages of their lowest-paid employees.<sup>181</sup> These proposals caused concern to management of Tyco and other Swiss companies.<sup>182</sup> For managers especially, executive compensation caps are considered negative: they make it harder for companies to hire the best managers (who, in theory, require the highest compensation), and threaten managers' personal bottom lines. In May 2014, Tyco announced its intention to invert from Switzerland to Ireland, citing "[r]ecent changes in Swiss law impacting regulatory environment" as matters "of great concern to [Tyco]."<sup>183</sup>

Tyco's experience with Switzerland's executive pay reforms is just one example of how inverting corporations may be affected by unfavorable changes in the corporate laws of their new jurisdictions of incorporation. Because inverted corporations may also have small footprints in their new foreign jurisdictions—they may have few employees and little in the way of operations in their new foreign home<sup>184</sup>—they also

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<sup>179</sup> Catherine Bosley, *Swiss Voters Approve Limits on "Fat Cat" Executive Pay*, BLOOMBERG (Mar. 3, 2013, 7:38 AM), <http://www.bloomberg.com/news/2013-03-03/swiss-voters-set-limits-on-ceo-paychecks-sf1-projections.html> (reporting on the Swiss voters' approval of the executive pay referendum); Neil MacLucas, *Swiss Voters Reject High-Pay Initiative*, WALL ST. J. (Nov. 24, 2013, 12:34 PM), <http://online.wsj.com/news/articles/SB10001424052702304011304579217863967104606> (reporting on the outcome of the vote on Switzerland's executive pay referendum).

<sup>180</sup> MacLucas, *supra* note 179.

<sup>181</sup> John Lichfield, *Swiss Voters Reject '1:12' Proposal to Cap Top Executives' Pay in Latest Referendum*, INDEPENDENT (Nov. 24, 2013), *available at* <http://www.independent.co.uk/news/world/europe/swiss-voters-reject-112-proposal-to-cap-top-executives-pay-in-latest-referendum-8960669.html>.

<sup>182</sup> MacLucas, *supra* note 179.

<sup>183</sup> *Tyco to Move to Ireland as Swiss Tighten Laws on CEO Pay, Immigration*, REUTERS (May 2, 2014, 1:40 PM), <http://www.reuters.com/article/2014/05/02/tycointernational-ireland-idUSL3N0NO41K20140502>.

<sup>184</sup> This is especially true for corporations that, for example, invert to Ireland by purchasing a Canadian company. Domestic corporations that invert to Ireland by purchasing an Irish company may acquire Irish operations as a result of the acquisition. Domestic corporations that invert to Ireland by purchasing a non-Irish company may truly have very little Irish operation in Ireland, since both the domestic corporation and its non-Irish target may have little previous operation in Ireland. See Ailish Finnerty & Christopher McLaughlin, *Inversions to Ireland*, PRAC. L.J. (Apr. 2014), at 74-75, *available at* <http://www.arthurcox.com/wp-content/uploads/2014/04/>

have relatively little influence in their new foreign jurisdictions. In contrast, when faced with unfavorable circumstances, a large corporation with a substantial local footprint can influence laws and regulations to change their circumstances. For instance, Washington state has given \$8.7 billion in tax breaks over sixteen years to keep Boeing from moving away, and New York state granted aluminum company Alcoa \$5.6 billion in tax breaks over thirty years for the same reason.<sup>185</sup> In contrast, inverted corporations that have little operational connection to their new jurisdictions of incorporation have less leverage when unfavorable legislation is on the horizon. In the context of inversion-specific legislation or regulation, the lack of influence becomes particularly interesting: there is no guarantee that popular inversion destinations will not come up with anti-inversion laws that make inverting out of those jurisdictions a cumbersome and costly process.

However, social changes in the United States also occur rapidly, and may cause concern for U.S. corporations. For example, a few years before Tyco was concerned about the Minder Initiative in Switzerland, many U.S. corporations were probably likewise concerned about how 2011's Occupy Wall Street movement would affect the domestic corporate and economic landscape. In addition, an argument can be made that corporations actually *increase* their political influence by inverting. For instance, a mid-market domestic company may invert from the United States to a smaller economy. In the smaller economy, the inverter's taxes generate a proportionally larger chunk of the smaller economy's total tax revenue. As a result, the inverter, through its footing of a larger share of its new home country's tax bill, has a proportionally larger share of influence than it did in the United States, where it footed a smaller percentage of the United States's total tax revenue.

### 3. Opportunity Costs of Acquiring a Foreign Business in Service of an Inversion

Modern inversions can be executed only through substantial cross-border business combinations, and most companies invert to their new jurisdictions by acquiring

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April2014\_SpotlightOn.pdf (providing an overview of U.S. inversions to Ireland from an Irish law firm's perspective).

<sup>185</sup> Danny Westneat, *Tax Breaks for Boeing: We're No. 1*, SEATTLE TIMES (Nov. 12, 2013), available at [http://seattletimes.com/html/localnews/2022245449\\_westneat13xml.html](http://seattletimes.com/html/localnews/2022245449_westneat13xml.html).

companies in that new jurisdiction.<sup>186</sup> In choosing to deploy its capital to buy a particular foreign business in a tax-friendly jurisdiction, an inverting corporation may lose out on other growth opportunities.

The opportunity cost of purchasing a particular foreign business in order to invert may be substantial. If Burger King's acquisition of Tim Hortons had been entirely driven by a desire to invert, for instance, Burger King would have tied up \$11.0 billion in order to invert.<sup>187</sup> Tying up a significant amount of a company's capital in a substantial foreign acquisition could affect an inverting company's future creditworthiness, causing cash flow issues. On the other hand, if the result of a foreign acquisition is that cash on the assets side of a company's balance sheet is simply converted to a non-cash asset—a foreign company—there is less cause for concern.

The fear that an inverting corporation may forgo other foreign growth opportunities purely to chase an inversion is also somewhat mitigated by recent deals. Pennsylvania company Mylan recently announced its corporate inversion to the Netherlands through the acquisition of a foreign division of Illinois corporation Abbott Laboratories.<sup>188</sup> Applied Materials' recent inversion to the Netherlands, too, was accomplished through the acquisition of Japanese target Tokyo Electron.<sup>189</sup>

#### 4. Costs to Inverting Corporations, Evaluated

Corporations assert that they invert to save on their tax bills. This single-minded focus on tax savings may change corporate behavior, causing corporations to incur, among other things, transition costs, the costs of being incorporated in a foreign jurisdiction in which it has relatively little influence, and opportunity costs when the inverting corporation deploys its capital to acquiring a particular foreign business. In many of these cases, inverting injects risk. However, many of these hidden costs to corporations of inverting can be and are mitigated—and the cost of mitigation may be but a small portion of an inverting corporation's huge tax savings.

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<sup>186</sup> See Professor Desai's data on inversions, *supra* note 12 (showing that most recent inversions are accomplished through a cross-border business combination transaction with a company already domiciled in the combined company's ultimate tax domicile).

<sup>187</sup> See *supra* note 14.

<sup>188</sup> Mylan, Inc., Current Report (Form 8-K) (Jul. 14, 2014) (announcing its proposed acquisition of Abbott and planned subsequent inversion to the Netherlands).

<sup>189</sup> *New Corporate Tax Shelter: A Merger Abroad*, *supra* note 13.



Moreover, while not inverting carries similar risk (for instance, that the relevant corporate law may change), the risk of inverting may be higher. On the whole, then, it appears that these costs and risks may, for a corporation, take a back seat in the face of enormous tax savings.

### *B. Inversion Costs Borne by the Public*

In addition to creating costs for corporations, inversions may also create costs that are borne by the public. These negative externalities are not accounted for by inverters.

#### 1. Inversions Driving Industry Over-Consolidation

Modern inversions require inverting companies to engage in substantial cross-border business combinations, so the availability of inversions may drive over-consolidation in some industries. For instance, in conjunction with Pfizer's proposed inversion through the acquisition of AstraZeneca, Professor Victor Fleischer observed that "[w]e don't know if Pfizer is pursuing AstraZeneca because the combined firm will be more efficient or because of the tax savings."<sup>190</sup> He notes that:

Coase argued that the boundaries of the firm depend on what is known as the make vs. buy decision. If the costs of making a product inside the firm are less than the costs of contracting out, the company will make the product, not buy it . . . . The boundaries of the firm are set at the point where the benefits of [buying from] the market are outweighed by [the] transaction costs [associated with buying from the market].<sup>191</sup>

However, when buying from outside—that is, buying another company—is associated with a tax break, the make vs. buy decision is distorted. Companies begin to think about the make vs. buy decision based in part on whether buying will garner a specific tax benefit. Buying is now a necessary part of inverting. Thus, inverting companies may choose to buy more than to make in order to take advantage of inversions' tax benefits. For companies, this has a potentially negative side effect: they may grow larger than would have been efficient in the absence of inversions' tax benefits. On the other hand, a

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<sup>190</sup> Victor Fleischer, *How Tax Laws Distort the Pfizer Deal*, N. Y. TIMES DEALBOOK (Apr. 29, 2014, 3:56 PM), <http://dealbook.nytimes.com/2014/04/29/how-tax-laws-distort-the-pfizer-deal/> (discussing, in the context of Pfizer's proposed inversion via an acquisition of AstraZeneca, the distortionary effects of current U.S. tax laws).

<sup>191</sup> *Id.*

particular inverting company's tax savings may still outweigh any inefficiencies that result from buying when it should have been making, so inverters may still come out ahead as a result of an inversion.

On a systemic level, however, multiple inverters engaging in inversion-related business combinations may have a negative effect for the public. Multiple business combinations almost necessarily lead to increasing consolidation within a particular industry. That is, a life sciences company that needs to buy another company in order to invert is likely to choose another life sciences company as a target, rather than, for example, a hotel chain. When multiple life sciences companies invert, they buy up many of the other life sciences companies in the market. Over time, industries may over-consolidate as many companies begin to choose to buy rather than to make in order to take advantage of the tax benefits of inverting.

Many have commented on the detriments of over-consolidation and the resulting monopolistic markets. For instance, scholars have noted that monopoly inhibits innovation.<sup>192</sup> This lack of innovation creates a negative externality that the public must bear. Many recent inversions have involved companies in the life sciences industry. In the life sciences industry, over-consolidation may lead to fewer drugs being developed. Pfizer's former President of Global Research and Development, John LaMattina, has called pharmaceutical-industry consolidation "devastating."<sup>193</sup> In a *Forbes* op-ed about Pfizer's bid for AstraZeneca, LaMattina noted that industry consolidation can lead to reduction in R&D projects: "While done with the best of intentions, the fact is that you can never be sure that you haven't dropped what would have been a major new advance to treat brain cancer . . . . [T]he major outcome for R&D in mergers is that

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<sup>192</sup> See, e.g., Mark A. Lemley, *Industry-Specific Antitrust Policy for Innovation* 2 (Stanford L. & Econ., Olin Working Paper No. 397, Sept. 1, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1670197](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670197) (noting that "there is substantial economic evidence suggesting that competition itself may act as a greater spur to innovation than monopoly," and citing Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in NATIONAL BUREAU OF ECONOMIC RESEARCH, *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS*, 609, 615 (1962)).

<sup>193</sup> John L. LaMattina, *The Impact of Mergers on Pharmaceutical R&D*, 10 NATURE REV. DRUG DISCOVERY 559 (Aug. 2011), available at [http://www.nature.com/nrd/journal/v10/n8/full/nrd3514.html?WT.ec\\_id=NRD-201108](http://www.nature.com/nrd/journal/v10/n8/full/nrd3514.html?WT.ec_id=NRD-201108) (describing the negative impact of mergers on research and development at Pfizer).

there will ultimately be fewer scientists in R&D and fewer ideas being pursued.”<sup>194</sup>

The only factor that mitigates industry over-consolidation may be that, as a public-relations matter, huge, iconic companies like Stanley Works, Walgreens, and Pfizer have more trouble inverting. If public relations can successfully limit the number of large companies inverting, over-consolidation may be somewhat mitigated.

## 2. Inversions Exacerbating an Already-Regressive Corporate Tax Rate

In addition to contributing to over-consolidation, inversions also change the corporate tax rate structure. The U.S. corporate tax rate is fairly flat: all but the smallest businesses are subject to a 35% statutory rate.<sup>195</sup> When large corporations are able to invert, however, they are able to take advantage of a much lower foreign tax rate, while smaller businesses continue to be subject to the 35% rate.

Inversions are expensive transactions with high upfront costs. For example, for its acquisition of Warner Chilcott, Actavis paid \$20.5 million to its two financial advisors, Merrill Lynch and Greenhill.<sup>196</sup> When Forest Labs inverted in 2014 (through a business combination with Actavis), it paid its financial advisor, J.P. Morgan, \$5 million for the delivery of its opinion, and approximately \$50.9 million when the deal

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<sup>194</sup> John LaMattina, *Biopharmaceutical Industry Consolidation Diminishes Future Drug Discovery*, FORBES (Jun. 10, 2014, 8:01 AM), <http://www.forbes.com/sites/johnlamattina/2014/06/10/biopharmaceutical-industry-consolidation-diminishes-future-drug-discovery/>. LaMattina said the same in 2011, when Pfizer merged with Wyeth:

From a business perspective, mergers and acquisitions are often considered attractive as they remove duplication, reduce costs and produce synergies . . . . [But i]n major [pharmaceutical] mergers today, not only are R&D cuts made, but entire research sites are eliminated . . . . After a major merger, the rate of progress of compounds in the development pipeline seems to decrease. For example, comparing data from Pfizer's pipeline updates . . . before the Wyeth merger in February 2008, and in February 2011, reveals that 40% of the compounds (not including those from Wyeth) have been in Phase II development for more than 3 years, which is below the industry average.

See John L. LaMattina, *supra* note 193, at 559-60.

<sup>195</sup> KEIGHTLEY & SHERLOCK, *supra* note 28, at 2.

<sup>196</sup> Actavis Ltd., Amendment No. 1 to Registration Statement (Form S-4), *supra* note 10, at 85, 96 (disclosing that Actavis agreed to pay \$10.5 million and \$10 million to Merrill Lynch and Greenhill, respectively).

closed.<sup>197</sup> Lawyers' fees for a public company deal—for negotiation, drafting, diligence, and filing of public disclosure, among other tasks—can also easily cost millions of dollars.<sup>198</sup>

For larger corporations, millions in upfront cost is doable: recent announcers include Applied Materials (with a market cap of \$25.5 billion<sup>199</sup>) and Pfizer (with a market cap of \$178.0 billion<sup>200</sup>). But this cost is harder for smaller corporations: a smaller company, like hip New York subscription cosmetics start-up Birchbox, has estimated annual revenues of about \$125 million.<sup>201</sup> A \$10 million inversion cost would be 8% of its annual revenues. Although smaller companies may hire less expensive counsel who spend less time on the smaller companies' less complicated inversions, evidence from previous generations of inversion activity supports the theory that only larger companies invert: in Professors Desai's and Hines's survey of third-generation inverters, even the smallest inverters had nine-figure market valuations.<sup>202</sup> Moreover, smaller companies where stock ownership is concentrated with a few founders are more likely to be affected by the shareholder-level taxes imposed by Section 367(a), adding an additional reason for small companies not to invert.

Scholarship on regulatory arbitrage supports the observation that large companies invert while small ones do not.<sup>203</sup> The conventional scholarly wisdom is that contracts, like the ones used in big business combinations, are designed to minimize transaction costs, including upfront drafting and negotiation costs.<sup>204</sup> But some deals that increase upfront transaction costs, like inversions, exist. Regulatory arbitrage theorizes that there is tension between regulatory costs and upfront transaction costs—some transactions that are costly

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<sup>197</sup> Actavis plc, Amendment No. 1 to Registration Statement (Form S-4) at 97 (May 2, 2014).

<sup>198</sup> One report published in 2013 estimated that the average billing rate for big-firm partners was over \$700 an hour, and for law-firm associates generally was about \$370 an hour. See Debra Cassens Weiss, *Average Hourly Billing Rate for Partners Last Year Was \$727 in Largest Law Firms*, ABA J. (Jul. 15, 2013), available at [http://www.abajournal.com/news/article/average\\_hourly\\_billing\\_rate\\_for\\_partners\\_last\\_year\\_was\\_727\\_in\\_largest\\_law\\_f/](http://www.abajournal.com/news/article/average_hourly_billing_rate_for_partners_last_year_was_727_in_largest_law_f/) (reporting on the billing rates of partners at large firms).

<sup>199</sup> *Applied Materials, Inc.* (AMAT), Yahoo! Finance, <http://finance.yahoo.com/q?s=AMAT> (as of Aug. 12, 2014).

<sup>200</sup> *Pfizer, Inc. (PFE)*, Yahoo! Finance, <http://finance.yahoo.com/q?s=PFE> (as of Aug. 12, 2014).

<sup>201</sup> Erin Griffith, *Exclusive: Birchbox Banks \$60 Million*, FORTUNE (Apr. 21, 2014), available at <http://fortune.com/2014/04/21/exclusive-birchbox-banks-60-million/> (reporting on Birchbox's Series B round and providing an estimate of Birchbox's annual revenues).

<sup>202</sup> Desai & Hines, *supra* note 12, at tbl. 1.

<sup>203</sup> See generally Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227 (2010).

<sup>204</sup> *Id.* at 230-31 (citing Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 255 (1984)).

upfront are perfectly rational if they are designed to minimize regulatory costs and if those regulatory cost savings outweigh the upfront transaction costs.<sup>205</sup> In the case of a corporate inversion, corporate inverters are engaged in the perfectly rational behavior of taking on huge one-time upfront transaction costs in order to save on ongoing regulatory costs. Those regulatory costs saved are expected to more than make up for the millions in upfront fees.

It is worth noting here that although the conventional wisdom in corporate finance is that worthwhile projects can be financed with debt, this may not be the case in practice. Thus, even if a corporate inversion would be rational for a small corporation to undertake, the small corporation may not be able to find the \$10 million upfront funding needed.

The phenomenon of big businesses inverting while small businesses do not has important implications. When big businesses invert and small businesses do not, the corporate tax rate starts to look regressive. To be sure, large, profitable corporations may already pay taxes at a significantly lower rate than the statutory rate,<sup>206</sup> but the ability to invert abroad exacerbates that problem.

### 3. Inversions Benefit Some Industries More Than Others

Inversions also affect industries within the United States differently. Consider, for instance, two large companies incorporated in Delaware: Domestic Corp. is a U.S.-based service provider with no overseas operations or sales, and International Corp. is a U.S.-based software company with extensive overseas operations and sales. A corporate inversion is worthwhile for International Corp., because multinational corporations can use corporate inversions to undo CFC classifications, access cash trapped overseas, and inject intercompany debt. On the other hand, corporate inversions are of less help to domestic corporations that do not otherwise intend to expand overseas:

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<sup>205</sup> *Id.* at 231 (noting that “deal lawyers face a tension between reducing regulatory costs on the one hand and increasing Coasean transaction costs on the other,” that “[d]eal lawyers routinely depart from the optimal transaction-cost-minimizing [deal] structure,” and that “[s]o long as the regulatory savings outweigh the increase in transaction costs, such planning is perfectly rational”).

<sup>206</sup> *Corporate Income Tax: Effective Tax Rates Can Differ Significantly from the Statutory Rate*, U.S. Gov’t Accountability Office 14 (May 2013), available at <http://www.gao.gov/assets/660/654957.pdf> (finding that for the 2010 tax year, large profitable domestic companies “paid U.S. federal income taxes amounting to 12.6 percent of the worldwide income that they reported in their financial statements”).

Domestic Corp., for instance, may not have any CFCs it wants to declassify or any cash trapped overseas that it needs to access. Thus, the availability of corporate inversions as a tax-saving mechanism favors some industries over others: corporations in industries that are very domestic cannot take advantage of an inversion's tax-saving features, while corporations in more multinational industries can and do invert to save on taxes. That said, Walgreens' recent contemplated inversion shows that even businesses with primarily a domestic footprint may find inversions worthwhile. However, domestic companies of a certain type—for instance, domestic telecommunications providers—that find it harder to find suitable foreign business combination partners may still be disadvantaged compared to corporations in industries with many suitable combination partners.

The distributional effect across industries is important. It amplifies the effects already observed across different corporation sizes: even within the subset of very big corporations, corporations in certain industries can more readily take advantage of corporate inversions' benefits, while corporations in other industries cannot. To the extent that the U.S. government cares about developing certain industries domestically for non-tax policy reasons, it may be of some concern that inversions essentially change the rate at which different industries are taxed.

#### IV. MOVING FORWARD

Corporate inversions have sparked debate from all corners: from the Oval Office, on both sides of the political aisle, and in the press.

Current policy responses fall into two broad categories. The first is to build higher fences, thereby making it harder for domestic corporations to avoid paying U.S. taxes by inverting. Notice 2014-52 and recent proposals from the Obama administration and Senator Levin are examples of this strategy.<sup>207</sup> Stephen Shay's and Senator Schumer's proposals are also higher-fence proposals: they reduce the most enticing benefits of inversions. The second category is centered on comprehensive tax system reform that would motivate domestic corporations to stay in the United States.<sup>208</sup> These proposals call

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<sup>207</sup> Vinik, *supra*, note 154 (providing coverage of recent anti-inversion bills and related political background).

<sup>208</sup> *Id.*

for lowering the corporate tax rate, moving toward a territorial tax regime, simplifying the Code generally, or a combination of some or all of these.

These proposals are not mutually exclusive: Senator Levin's proposal, for instance, contemplates making inversions much harder to execute for two years, which is meant to give Congress enough time to enact comprehensive tax reforms.<sup>209</sup> And Senator Levin's moratorium concept could be supplemented by Shay's or Senator Schumer's proposals, which would make inversions during the moratorium period even less likely.

This Article has argued that inversions create costs for the inverting company and also generate negative externalities that are borne by the public. This Part suggests several starting points for thinking about future inversion policy.

#### A. *Outright Ban on Inversions*

In theory, one policy solution is to ban inversions outright. This can be accomplished through, for instance, a law that requires all cross-border business combinations be examined by a government body to ensure that they are not inversions. This policy, combined with perfect enforcement, could eliminate many of the costs discussed in this Article. For instance, to the extent inversions exacerbate the problem of large corporations paying taxes at lower rates, that problem will be reduced. Moreover, if using a cross-border business combination to leave the United States is not an option, corporations' managerial or operational behavior may be less motivated by a desire to chase lower taxes.

An outright ban, however, comes with many line-drawing and logistical concerns. Differentiating between tax-driven transactions (inversions) and business-driven transactions that happen to result in re-incorporation abroad will always be a problem. In addition, companies highly motivated to invert have, several times before, invented creative structures to sidestep rules meant to thwart inversions. Section 7874 already attempts to ban inversions and successfully banned the purely paper transactions of earlier generations. Corporations have inverted nonetheless by coupling an inversion with a large cross-border transaction. Even an outright ban coupled with government pre-clearance of all cross-border transactions to ensure that they are not inversions is unlikely to be unchallenged by

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<sup>209</sup> Stop Corporate Inversions Act of 2014, *supra* note 44.

transactional innovations that make inversions, in some form or another, possible.

### *B. Comprehensive Tax Code Overhaul*

A complete overhaul of the Code may also reduce inversions' negative effects, address some tax revenue loss concerns, and reduce many of the hidden costs identified in this Article. While specific prescriptions for a Code overhaul are outside the scope of this Article, this Article can consider the theoretical impacts of a Code overhaul.

Suppose, for instance, that after a comprehensive overhaul of the Code, the United States's corporate tax system becomes identical to Ireland's. Under those circumstances, U.S. companies have little reason to invert to Ireland for tax reasons. In fact, an inversion under such circumstances would cost the corporation in transaction and transition costs, but not provide the tax benefits of moving to a lower-tax jurisdiction. A Code overhaul would thereby ensure that when domestic corporations leave the United States, they are not leaving for tax-savings reasons, but for other reasons—for instance, to take advantage of corporate laws that may improve value for shareholders.<sup>210</sup>

On the other hand, a complete overhaul of the Code, like a complete ban with perfect enforcement, brings its own logistical problems. A complete overhaul requires substantial political cooperation—a feat that is difficult in the best of times, and particularly challenging with today's fractured Congress. Moreover, it is hard to know *ex ante* whether a complete Code overhaul can begin to address the inversion issue. Surely, a Code overhaul cannot and will not be driven solely by the desire to disincentivize inversion activity. A Code overhaul could solve many issues, but it may not address inversions adequately or at all.

### *C. Middle-of-the-Road Solutions*

Policymakers can also consider other solutions—or perhaps solutions that combine several proposals—to address inversion activity.

For example, there may be merit in combining Senator Levin's moratorium idea with an attempt at tax reform. A

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<sup>210</sup> See, e.g., Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001) (comparing the firm value of Delaware and non-Delaware corporations in the 1980s and 1990s, and finding that Delaware corporations generally have higher firm values).



temporary moratorium puts an immediate stop on tax revenue loss from inversions and also limits the hidden costs identified in this Article. Moreover, a temporary moratorium may have the benefit of setting a deadline for reform, since inversions can return to popularity at the end of the moratorium if more comprehensive change is not implemented. However, previous Congressional promises to reform tax laws have borne limited fruit, and with today's Congress, reform seems even less likely. Moreover, many parties do not stand to lose at the end of the moratorium. Legislators who favor inversions, for instance, may be motivated to wait for the moratorium to end and for today's status quo to return, making inversions once again possible. In the absence of a real chance at comprehensive reform, any temporary moratorium is only a short-term, stop-gap measure.

Other creative solutions exist. Since a desire to access "trapped cash" overseas is one of the most oft-cited reasons for inverting, solutions can target the trapped cash issue. A temporary holiday that grants tax-free or low-tax repatriations to the United States of offshore income could help curb some inversion activity. In the alternative, ending deferred taxation of foreign-earned income may also work. Both cases could be better for the government's bottom line than the status quo. A tax holiday allows the government to collect *some* tax revenue on cash trapped offshore. Eliminating deferred taxation on foreign-earned income ends the incentive for cash to be trapped offshore at all.

A more tailored version of the tax holiday concept is to target only certain industries with a tax holiday. For instance, the government could offer tax holidays to life sciences companies, many of which have inverted, as a way to stem a temporary inversion interest in that industry. States have implemented similar plans. For example, Washington has given \$8.7 billion in tax breaks over sixteen years to keep Boeing from moving away, and New York granted aluminum company Alcoa \$5.6 billion in tax breaks over thirty years for the same reason.<sup>211</sup> These temporary, industry-specific breaks help ease potentially unobservable growing pains these industries are going through and may be enough to deter inversion.

A tax holiday, however, presents many challenges. First, it depends on the assumption that cash really is trapped

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<sup>211</sup> Westneat, *supra* note 185 (reporting on recent tax breaks for Boeing by Washington state).

offshore—a fact that is often disputed.<sup>212</sup> If foreign-earned cash is not trapped abroad, and the ability to access trapped cash is not actually a significant driver of inversion activity, then a tax holiday that allows corporations to bring trapped cash back to the United States will have a substantially diminished effect on slowing the rate of inversion activity. Moreover, if the tax holiday is not sufficiently narrowly tailored, corporations that were not otherwise considering inversions may also use the opportunity to repatriate trapped cash. Worse, using tax breaks as a way to stem current inversion activity could motivate corporations to threaten to invert in order to trigger future tax holidays. In that case, a tax holiday may actually have a negative effect on revenue. Finally, temporary tax holidays may, like temporary moratoriums, be useful only for a limited time. At the state level, there is evidence to suggest that temporary breaks given to certain companies do not have a lasting effect in keeping a company within a certain jurisdiction. For example, despite the fact that Washington state has given Boeing many tax breaks, the company is constantly on the lookout for better deals out of state.<sup>213</sup>

#### D. *Optimal Policy?*

Anti-inversion policies enacted thus far have been piecemeal solutions to a fractured tax system that seems out of sync with international norms. Notice 2014-52, while tailored to reduce some of the most enticing benefits of inversions, is another Band-Aid. Like many solutions before it, Notice 2015-52 reduces some of inversions' benefits—for example, it reduces the benefits of hopscotch loans and some post-inversion restructurings. On the other hand, more comprehensive tax reform—whether that be a revamp of the U.S. tax system to more closely resemble that of other developed countries or not—also seems unlikely, given political realities.

The most sensible yet practicable solution, therefore, may be a temporary moratorium that buys time for reform to be considered. A relatively short moratorium on inversions may allow enough time for legislators and policymakers to consider more comprehensive reform, and the short timeframe may also

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<sup>212</sup> See *supra* note 37 and accompanying text.

<sup>213</sup> Kirk Johnson, *Boeing Looks Around, and a State Worries*, N.Y. TIMES (Dec. 10, 2013), <http://www.nytimes.com/2013/12/11/us/washington-state-not-ready-to-ponder-future-without-boeing.html?pagewanted=all&r=0> (reporting on Boeing's interest in moving to other states).

motivate policymakers to work quickly. In any case, only with proper consideration of the whole story—including the hidden costs noted here—can appropriate policy be crafted.

## CONCLUSION

In recent years, many domestic corporations have left the United States for tax-friendly foreign shores through cross-border business-combination inversion transactions. While inversions have gained significant attention from policymakers and the press, they have received little attention in the academic literature. This Article identifies and examines the tax issues that motivate inversion transactions and introduces to the discourse a variety of other factors that should be considered in companies' inversion decisions and the government's response to inversions. In particular, while individual corporations' tax benefits dwarf some of inversions' corporate-level, non-tax downsides, this Article identifies how systemic corporate exodus, especially in a few concentrated industries, may create negative externalities for the public. The magnitude of potential public harm, and the extent to which the current generation of anti-inversion policy can mitigate that harm, is an area ripe for further research.

# Defining Domain

## HIGHER EDUCATION'S BATTLES FOR CYBERSPACE

*Jacob H. Rooksby*<sup>†</sup>

### INTRODUCTION

Juliet famously mused, “What’s in a name? that which we call a rose / By any other word would smell as sweet.”<sup>1</sup> The same cannot be said for Internet domain names.<sup>2</sup> One’s inability to own a specific domain name has delayed product launches, caused companies to change names, and led to disputes with alleged cybersquatters.<sup>3</sup> The utility of domain names has led to a robust secondary market of buyers and sellers, where domain names that encompass generic words, or are comprised of very few letters or numbers, often change hands for hundreds of thousands of dollars, or more.<sup>4</sup> In short,

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<sup>1</sup> WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2, lines 43-44 (Houghton Mifflin Co. ed. 1911).

<sup>2</sup> Domain names are alphanumeric character strings that substitute for the numerical addresses actually used by Internet host computers to locate one another and provide requested information to end users. See *infra* note 13 and accompanying text. <amazon.com> is an example of a domain name.

<sup>3</sup> See, e.g., *Microsoft Files Dispute Over XboxOne.com and XboxOne.net Domain Names*, FUSIBLE (May 23, 2013), <http://fusible.com/2013/05/microsoft-files-disputes-over-xboxone-com-and-xboxone-net-domain-names/> (noting that Microsoft failed to register <xboxone.com> and <xboxone.net> before unveiling new console called Xbox One, leading to arbitration contest over those domain names).

<sup>4</sup> Short domain names and generic word domain names consistently have topped the list of the most expensive domain names sold on the secondary market. For example, <sex.com> sold for \$13 million in 2010, while <casino.com> and <slots.com> each sold for \$5.5 million in 2003 and 2010, respectively. For a list of the top-15 most expensive domain names known to have changed hands on the secondary market, see Ben Woods, *15 of the Most Expensive Domains of All Time*, NEXT WEB (Aug. 13, 2013), <http://thenextweb.com/shareables/2013/08/13/15-of-the-most-expensive-domains-of-all-time/>. For an example of a secondary market for domain names, visit <sedo.com>.

domain names matter in the eyes of producers and consumers: the difference of one letter in a URL can mean the difference between an online visit that leads to a sale, or a distraction that leads to annoyance, confusion, or worse.<sup>5</sup>

Higher education as an industry is not immune to these market considerations. Prospective and current students, faculty, administrators, alumni, and policymakers all have an interest in ensuring they can easily identify their college or university online. Separating the authentic from the inauthentic perhaps is even more important in the cyberworld than the brick-and-mortar world—after all, few are likely to set foot on the University of New Haven, believing it to be Yale. But how do we know for sure if a given domain name belongs to, or is affiliated with, the institution it appears to reference?<sup>6</sup>

Fortunately for colleges and universities, the Internet's founding authorities gave higher education an advantage in defining its metes and bounds in cyberspace. From the beginning of the creation of the domain name system, colleges and universities were not forced to compete with the open market in registering a domain name. The generic top-level extension .EDU was created with the understanding that only colleges and universities could own second-level extensions in that space. While governing authorities have changed the requirements for registration over time, the .EDU extension remains restricted, unlike the first-come, first-served nature of the popular .COM, .NET, and .ORG extensions.<sup>7</sup>

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<sup>5</sup> See Jacqueline D. Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 WAKE FOREST L. REV. 1361, 1365 (2005) ("Clearly, a domain name can be a very valuable business asset, in that it can operate like a combination trademark and shop front that both assists customers in locating a commercial Web site and can develop goodwill in the sense of attracting customers over a period of time.").

<sup>6</sup> Cf. 7 Things You Should Know About . . . DNSSEC, EDUCAUSE 2 (Jan. 2010), available at <http://www.educause.edu/ir/library/pdf/est1001.pdf> ("Because users tend to trust certain domains, including the .edu domain, more than others, expectations for the reliability of college and university websites are high."). Take as an illustration <gibill.com>, <gibillamerica.com>, and <armystudyguide.com>. Until these domain names were transferred to the U.S. government's Department of Veterans Affairs (VA) as part of a settlement with state attorneys general, web sites operated at these domain names that made them look like official online outposts of the VA. Libby A. Nelson, *Attorneys General Announce Settlement with For-Profit College Marketer*, INSIDE HIGHER ED (June 28, 2012), <http://www.insidehighered.com/news/2012/06/28/attorneys-general-announce-settlement-profit-college-marketer>. But instead of providing general information about the GI Bill and the array of educational opportunities available to veterans, the web sites promoted enrollment in just 15 colleges, most of them for-profit institutions. *Id.*

<sup>7</sup> Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 HASTINGS COMM. & ENT. L.J. 359, 382-85 (2003) (describing restricted versus unrestricted domain name extensions).

The rationale for giving colleges and universities their own domain name space, uncluttered by competing claims of others outside of higher education, is consonant with society's historic conception of higher education as a different type of industry, detached from the market, and allegiant to its own unique, public-serving norms and academic values.<sup>8</sup> Higher education once was viewed as a commercially sheltered industry that needed to be protected from the unseemly aspects of the market, and the creation of the restricted .EDU extension arguably reflects such a romantic ideal.

Yet American higher education in modern times is very familiar with the market, and using intellectual property to create or capture value is one method institutions have pursued in response to heightened budgetary pressures.<sup>9</sup> Previous work in this line of research, by myself and others, has noted an increasing fixation with intellectual property acquisition and protection by colleges and universities, chiefly with respect to patents, copyrights, and trademarks.<sup>10</sup>

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<sup>8</sup> For one description of this historic conception of higher education, see DAVID L. KIRP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION 7 (2003) (“[E]mbedded in the very idea of the university—not the storybook idea, but the university at its truest and best—are values that the market does not honor: the belief in a community of scholars and not a confederacy of self-seekers; in the idea of openness and not ownership; in the professor as a pursuer of truth and not an entrepreneur; in the student as an acolyte whose preferences are to be formed, not a consumer whose preferences are to be satisfied.”).

<sup>9</sup> See, e.g., ELIZABETH POPP BERMAN, CREATING THE MARKET UNIVERSITY: HOW ACADEMIC SCIENCE BECAME AN ECONOMIC ENGINE (2012) (describing how academic science, protected by intellectual property, has fueled economic growth); Arti K. Rai, *The Increasingly Proprietary Nature of Publicly Funded Biomedical Research: Benefits and Threats*, in BUYING IN OR SELLING OUT? THE COMMERCIALIZATION OF THE AMERICAN RESEARCH UNIVERSITY 117 (Donald G. Stein ed., 2004) (discussing how higher education's use of intellectual property protection is turning publicly-funded science into proprietary science); SHEILA SLAUGHTER & GARY RHOADES, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION (2004) (describing the rise of intellectual property in higher education as reflecting the industry's move to the market); Liza Vertinsky, *Universities As Guardians of Their Inventions*, 2012 UTAH L. REV. 1949, 1955-56 (discussing the traditional methods by which universities use intellectual property to harness the economic power of their faculty's inventions).

<sup>10</sup> See, e.g., Jacob H. Rooksby, *Innovation and Litigation: Tensions Between Universities and Patents and How to Fix Them*, 15 YALE J.L. & TECH. 312 (2013) (tracking rise in university enforcement of patents); Jacob H. Rooksby, *University™: Trademark Rights Accretion in Higher Education*, 27 HARV. J.L. & TECH. 349 (2014) (tracking rise in college and university trademark activity); CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY (2001) (describing contention between universities and their faculty regarding the treatment of copyrights and patents); Peter Lee, *Patents and the University*, 63 DUKE L.J. 1 (2013) (describing the growth of university patenting and a decline in judicial inclination to treat higher education differently with respect to the patent laws); Brian J. Love, *Do University Patents Pay Off? Evidence from a Survey of University Inventors in Computer Science and*

Notwithstanding the contributions of these previous works, the nature of higher education's intellectual property interests online—driven in particular by its trademark interests—has not been fully considered until now. Historical and empirical understanding of domain name registration behavior and related disputes in higher education are uncharted territory in intellectual property scholarship and higher education law scholarship. This Article situates within and makes contributions to those two fields.

As walls between the academy and the market erode, and institutions place more emphasis on intellectual property acquisition and enforcement in light of growing resource constraints, how colleges and universities define their space online has emerged as an unexamined question ripe for consideration. This Article provides historically and empirically supported data points in response to that inquiry, mining and analyzing records concerning higher education's use of the Uniform Domain-Name Dispute-Resolution Policy (UDRP)—essentially an arbitration vehicle for resolving rights disputes concerning domain names—and specialized federal court litigation concerning domain names.<sup>11</sup> These fields of exploration are rich points of entry for understanding how colleges and universities navigate intellectual property laws and harness their rights in furtherance of institutional policy objectives.

The history of the .EDU domain name extension and domain name ownership disputes in higher education may seem an esoteric and picayune topic to many, if noticed at all. Even within legal circles, few tend to focus on the practical and legal issues implicated by domain name ownership and rights contests, let alone by institutions of higher education. Perhaps the primary explanation for the dearth of scholarly attention to this Article's topic is that the cyberworld—although now omnipresent in Western democracies—still is in its infancy. With respect to

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*Electrical Engineering*, 16 YALE J. L. & TECH. 285 (2014) (noting rise in university patent emphasis in the high-tech fields of computing and telecommunications).

<sup>11</sup> This Article, by design, does not focus directly on the equally interesting question of how colleges and universities have chosen to use and regulate their online spaces, although this question has received some popular and academic attention from the .EDU's earliest days through the present. See, e.g., Larry Lange, *A Tour of University Web Sites Is Quite An Education—What the Devil's Going on at .edu?*, ELECTRICAL ENGINEERING TIMES, Feb. 5, 1996, at 1 (describing the use of .EDU space by students to post pornography and other forms of provocative speech); Kem Saichaie & Christopher C. Morpew, *What College and University Websites Reveal About the Purposes of Higher Education*, 85 J. HIGHER EDUC. 499 (2014) (analyzing textual and visual elements on 12 college and university web sites).

domain names in particular, the average consumer only has been able to buy such property for roughly 15 years.<sup>12</sup>

Yet despite the lack of robust academic or practitioner attention to this area, research into domain name ownership disputes by colleges and universities provides a timely window into the evolving thinking of higher education leadership over questions of intellectual property and institutional identity, brand formation and protection, and commercial involvement. Intangible rights that institutions are willing to spend time and money to fight over on some level reflect institutional values and priorities. Research revealed in this Article provides unique and fresh understanding of what those values and priorities may be, as well as provides footing for analyzing these activities from a policy standpoint.

Part I of the Article provides relevant background and history on the workings of the domain name system and the .EDU extension, arbitration and litigation vehicles available for resolving domain name disputes, and college and university activity in these realms. Part II discusses the methods and limitations of the original study undertaken for this Article. Part III presents findings. Part IV discusses policy concerns related to higher education's domain name acquisition efforts, including the activity's bearing on institutional reputation and commitment to free speech, the delicate relationship between brand protection and brand expansion, and the extent to which the studied activity reflects mature legal strategy on the part of

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<sup>12</sup> This Article treats *domain names* as effectively synonymous with *domain name registrations*, although this slight semantic difference is not without an important distinction: the former conceptualizes domain names as some combination of personal and real property, whereas the latter connotes a contractual right. Although domain names have many characteristics that make them seem less like property and more like contract rights (namely, one never owns a domain name in fee simple), one cannot ignore the connection Internet users make between online space and physical space. On some level, we expect the physical and virtual worlds to coalesce, and often are disappointed, confused, or even humored when they do not (anyone visiting <whitehouse.com>, intending to find information about the White House, will readily agree). I recognize the hybrid property-contractual nature of domain names for this reason. See also JACQUELINE LIPTON, INTERNET DOMAIN NAMES, TRADEMARKS AND FREE SPEECH 5, 295 (2010) (noting that "domain names are arguably the first truly global Internet analog to real property. They are an example of something that is like real property, but that exists in the borderless realm of cyberspace," and later arguing that "the property model" is the best way to conceptualize domain names); Xuan-Thao N. Nguyen, *Cyberproperty and Judicial Dissonance: The Trouble with Domain Name Classification*, 10 GEO. MASON L. REV. 183, 192, 205 (2001) (concluding that "the bundle of rights resides in domain names and consequently, domain names should be recognized as property . . . or more precisely, intangible property"); see also *Kremen v. Cohen*, 337 F.3d 1024, 1029-36 (9th Cir. 2003) (analyzing domain name as property for purposes of state-law tort of conversion).



colleges and universities pursuing such actions. Part IV closes by reflecting on the study's findings and contributions to offer a cautious view of higher education's cyber future. Here, from a normative perspective, I offer a provisional set of critical questions that college and university decision makers ought to consider before determining whether to harness the power of one of their trademarks to capture an already registered domain name. Finally, in the Conclusion, I summarize the Article's contributions and comment on how contentious efforts to acquire domain names situates within larger contests over rights and space in higher education.

## I. BACKGROUND ON INTERNET DOMAIN NAMES AND COLLEGE AND UNIVERSITY DOMAIN NAME ACTIVITY AND DISPUTES

This Part begins by introducing the Domain Name System (DNS) and its workings, as well as other important lexicon concerning domain names. It then provides a history of the .EDU extension—including its genesis, management, and key operating premises and rules—and explains how the extension has helped shape higher education's identity, reflecting the industry's twin goals of establishing authenticity and legitimacy online. This section then moves to a legal discussion of the arbitration and litigation avenues available to those wishing to challenge a third-party's ownership or use of a domain name. The section concludes with a survey of the limited literature available concerning college and university use of the UDRP and specialized federal court litigation to resolve domain name disputes.

### A. *The Domain Name System Explained*

Domain names are “alpha-numeric character strings . . . that substitute for the numerical addresses[, or Internet Protocol (IP) addresses,] actually used by Internet host computers to locate one another” and provide requested information to end users.<sup>13</sup> The DNS essentially is a directory or lookup system that allows users to interact with online information in relation to alphanumeric strings, as opposed to IP addresses whose numbers are seldom memorable.<sup>14</sup> Like real

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<sup>13</sup> James M. Jordan, III, *Domain Names: Basics, Pointers, and Current Events*, ELECTRONIC BANKING L. & COM. REP., May 1997, at 12.

<sup>14</sup> Compare the ease with which one can remember <cnn.com> versus its corresponding IP address, 157.166.226.26.

property, every domain name is unique, and thus their scarcity means that their branding function is important.<sup>15</sup> As Professor Burk recognized in 1995, domain names are “*both* names and addresses; they both locate and identify Internet sources.”<sup>16</sup>

While the technical locating function of domain names is the reason for their existence, the identifying importance of domain names is the feature that receives trademark and brand interest. If your brand is Coke, owning <coak.com> but not <coke.com> will not do. General rules of thumb dictate that “the more memorable a domain name, the more value it enjoys. Also, less is more; a short domain name is worth more than a long domain name.”<sup>17</sup>

The Internet Corporation for Assigned Names and Numbers (ICANN)—a nonprofit corporation based in Marina del Ray, California—has technical oversight authority over most of what we think of as the functioning Internet.<sup>18</sup> ICANN’s primary mission consists of keeping the Internet secure, stable, and interoperable across countries and platforms.<sup>19</sup> ICANN accomplishes these goals by engaging in multi-stakeholder, transnational, consensus-driven approaches to policy promulgation.<sup>20</sup> ICANN delegates key technical coordinating functions—such as IP address space allocation, protocol parameter assignment, and management of the DNS and root server functions of the Internet—to the Internet Assigned

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<sup>15</sup> Wayde Brooks, Note, *Wrestling Over the World Wide Web: ICANN’s Uniform Dispute Resolution Policy for Domain Name Disputes*, 22 HAMLINE J. PUB. L. & POL’Y 297, 304 (2001).

<sup>16</sup> Dan L. Burk, *Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks*, 1 RICH. J.L. & TECH. 1, ¶ 30 (1995), available at <http://jolt.richmond.edu/v1i1/burk.html>. In this regard, Professor Burk noted how some monikers in the analogue world also perform location and identification functions, such as mnemonic 1-800 numbers (e.g., “1-800-FLOWERS”) and personalized mailing addresses (e.g., “1 Coca-Cola Plaza”). *Id.* at ¶¶ 34-39, 52-56.

<sup>17</sup> Nguyen, *supra* note 12, at 187-88.

<sup>18</sup> Prior to the founding of ICANN, oversight authority was shared by a variety of entities, including the National Science Foundation, NASA, the U.S. Army, the University of Southern California, Stanford Research Institute, the University of Maryland, the Internet Software Consortium, PSINet, and InterNIC. See Bill Frezza, *A Top-Level Domain By Any Other Name*, NETWORK COMPUTING, Feb. 1, 1997, available at 1997 WLNR 2822440; see generally MILTON L. MUELLER, *RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE* 50-56 (2002).

<sup>19</sup> See *Bylaws for Internet Corporation for Assigned Names and Numbers*, ICANN.ORG, Art. I, Sec. 2(1) (July 30, 2014), <https://www.icann.org/resources/pages/bylaws-2012-02-25-en>.

<sup>20</sup> For a comprehensive description of ICANN and its functions, see *Welcome to ICANN! How Does ICANN Work?*, ICANN.ORG, <https://www.icann.org/resources/pages/welcome-2012-02-25-en> (last visited Mar. 31, 2015).

Numbers Authority (IANA), a California-based subsidiary.<sup>21</sup> Together, these two entities play important roles in promoting the fair and manageable use and functioning of the global DNS, most particularly as it relates to the creation and maintenance of new Internet root zones (i.e., the space after the period furthest to the right in a URL address). While ICANN, by necessity, promulgates policies to effectuate its mission, technically the non-governmental organization does not enjoy global policymaking authority over the Internet.<sup>22</sup> This virtual power vacuum means that various national and state legislatures, as well as non-profit organizations, contribute significantly to the formation of what we might think of as global Internet policy.<sup>23</sup>

Name space on the Internet is parceled out into distinctly manageable top-level domains (called TLDs), or root zones, which are demarcated with the final period in the string, or root. TLDs are further separated into generic TLDs (called gTLDs) and TLDs distinguished by a two-letter country code (called ccTLDs).<sup>24</sup> Originally only seven gTLDs (i.e., .COM, .ORG, .NET, .EDU, .INT, .GOV, and .MIL.) and 236 ccTLDs existed.<sup>25</sup> ICANN introduced seven additional gTLDs in November of 2000 (i.e., .BIZ, .MUSEUM, .PRO, .INFO, .NAME, .AERO, and .COOP), although none of these proved as popular as the original seven gTLDs.<sup>26</sup> More gTLDs were soon added, including .CAT, .JOBS, .MOBI, .XXX, and .TRAVEL.<sup>27</sup>

Space within TLDs may be further parceled out and registered to end users, creating what we think of as domain names (which technically are second-level domain names), like <nike.com>.<sup>28</sup> Records of space allocation in a given TLD are kept by one entity, called a registry. Registries permit entities

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<sup>21</sup> See *Introducing IANA*, IANA.ORG, <http://www.iana.org/about> (last visited Mar. 31, 2015).

<sup>22</sup> LIPTON, *supra* note 12, at 304.

<sup>23</sup> *Id.* at 305.

<sup>24</sup> Although ccTLDs primarily were intended for use by people within the country that controls a given ccTLD, "[t]he commercial value of domain name country codes . . . caused at least some nations with attractive two-letter initials such as Tuvalu [.tv] to open registration beyond their country to anyone willing to pay a registration fee." Scott Bearby & Bruce Siegal, *From the Stadium Parking Lot to the Information Superhighway: How to Protect Your Trademarks from Infringement*, 28 J.C. & U.L. 633, 654-55 (2002).

<sup>25</sup> *Id.*; Brett R. Harris, *Internet Update: Milestone Changes to the Domain Name System Underway*, N.J. LAW., Dec. 2008, at 62-63.

<sup>26</sup> Nguyen, *supra* note 12, at 197; see also Ellen Whyte, *Domain Name Functions*, NEW STRAITS TIMES, Sept. 22, 2005, available at 2005 WLNR 28851839.

<sup>27</sup> See Harris, *supra* note 25, at 62-63.

<sup>28</sup> *Id.* After the second level, additional levels can be created within the same second-level domain name without further registration. For example, <mail.duq.edu> is a third-level domain name. MUELLER, *supra* note 18, at 50-56.

called registrars (e.g., GoDaddy), which meet certain criteria established by each registry, to sell rights to space in the TLD that the registry controls. Registration in some TLDs, such as the .COM, is open to all-comers willing to pay the yearly registration price (often less than \$10.00 per year, with multi-year registrations permitted), whereas registration in other TLDs—particularly ccTLDs—is restricted and available only to those who meet certain eligibility criteria (e.g., registration of a trademark in the corresponding country, citizenship in the corresponding country, etc.).<sup>29</sup> Registries require registrars to collect contact information from registrants and make that information publicly available through what is called a WHOIS database. These databases are accessible through registrar web sites and allow browsers to determine the name, email, and mailing address for the registrant of any given domain name registered through that registrar.<sup>30</sup>

Dissatisfaction with the limited array of TLDs, and a monopoly on the control of the root, led some companies in the late 1990s and early 2000s to experiment with ways to bypass the DNS system.<sup>31</sup> Based on buy-in from some Internet service providers and end consumers (who downloaded and installed required software), these companies provided mechanisms by which Internet users could visit what appeared to be domain names not otherwise available for registration to the general public.<sup>32</sup> ICANN and related leaders of the nascent Internet resisted these developments, which informally were known as the AlterNIC movement.<sup>33</sup> Detractors argued that a stable and authoritative DNS, coordinated through a single root system, was required in order to provide reliability and universal resolvability of domain names. Ultimately, these arguments won out.

The movement for more and different Internet space, however, did eventually gain traction within ICANN. In 2012, after a period of lengthy consideration and discussion, the organization began accepting applications for the creation of

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<sup>29</sup> See Manheim & Solum, *supra* note 7, at 381-84.

<sup>30</sup> Rampant inaccuracies exist in these databases, however, as the information submitted by registrants is not independently verified, nor is there any penalty for providing incomplete, inaccurate, or fraudulent information. For a further description of WHOIS databases and searching, see *infra* note 208 and accompanying text.

<sup>31</sup> See MUELLER, *supra* note 18, at 50-56.

<sup>32</sup> See Neil Batavia, Comment, *That Which We Call a Domain by Any Other Name Would Smell As Sweet: The Overbroad Protection of Trademark Law as It Applies to Domain Names on the Internet*, 53 S.C. L. REV. 461, 479-81 (2002) (explaining how a URL like <dell.computer> did not actually exist in the DNS, but was instead <dell.computer.xs2.net> in the DNS).

<sup>33</sup> See Frezza, *supra* note 18 (describing AlterNIC).

new gTLDs, including ones in non-Latin characters (Cyrillic, Arabic, Chinese, etc.).<sup>34</sup> These new domain name extensions were intended to serve a variety of Internet users. ICANN contemplated that products (such as .IPAD), companies (such as .MICROSOFT), industries (such as .BANK), and regions (such as .SOUTH), among others, might all be reflected in the new root space. The application process was not designed to be easy, however. Applicants had to pay \$185,000 to ICANN and satisfy a variety of criteria the organization established, mainly aimed at ensuring the applicant's financial and technical viability to serve as registry for a domain name extension.<sup>35</sup>

After the application period ended, ICANN revealed that it had received 1,930 applications, all of which were randomly assigned lottery numbers to determine in which order ICANN would review them.<sup>36</sup> A public comment period followed. Google applied for 101 new extensions, although the most sought by any one company were the 307 applications filed by Donuts, Inc., a company created to specialize in the sale of space in new generic domain name extensions.<sup>37</sup> New extensions were approved, and registrars began selling registrations in these extensions to the public, beginning in October of 2013.<sup>38</sup> The first seven new gTLDs made available to the public were .BIKE, .CLOTHING, .GURU, .HOLDINGS, .PLUMBING, .SINGLES, and .VENTURES.<sup>39</sup>

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<sup>34</sup> See Press Release, ICANN, Internet Domain Name Expansion Now Underway (Oct. 23, 2013), available at <https://www.icann.org/resources/press-material/release-2013-10-23-en>.

<sup>35</sup> See Elizabeth Herbst Schierman, *.Com and .Net, Make Room for .Trademark: What You Should Know About the New Global Domain Names*, ADVOCATE, Feb. 2010, at 25, 26, available at <https://isb.idaho.gov/pdf/advocate/issues/adv10feb.pdf>. Once a new top-level extension is created, the registry operator must pay \$25,000 a year to ICANN simply to maintain it. David J. Kappos, *New Internet Domain Name Options Are Coming: Is Your Organization Ready?*, INSIDE COUNSEL (Aug. 16, 2013), <http://www.insidecounsel.com/2013/08/16/new-internet-domain-name-options-are-coming-is-you>.

<sup>36</sup> See *Program Statistics*, ICANN NEW GENERIC TOP-LEVEL DOMAINS, <http://newgtlds.icann.org/en/program-status/statistics> (last visited Mar. 7, 2015).

<sup>37</sup> See Andrew Allemann, *Donuts Raises \$100 Million, Applies for 307 New TLDs*, DOMAIN NAME WIRE (June 5, 2012), <http://domainnamewire.com/2012/06/05/donuts-raises-100-million-applies-for-307-new-tlds/>; Michael Berkens, *Google Applies for 101 New gTLD's; Amazon 77; Microsoft 11; Apple 1*, THE DOMAINS (June 13, 2012), <http://www.thedomains.com/2012/06/13/google-applies-for-101-new-gtlds-amazon-77-microsoft-11-apple-1/>. Some of the new extensions managed by Donuts, Inc. include .EMAIL, .TOYS, .FINANCIAL, .FLORIST. See *Welcome to the Not Com Revolution*, DONUTS, <http://www.donuts.co/tlds/> (last visited Mar. 7, 2015).

<sup>38</sup> For a listing of the new extensions, and the dates on which they were created, see *Delegated Strings*, ICANN NEW GENERIC TOP-LEVEL DOMAINS, <http://newgtlds.icann.org/en/program-status/delegated-strings> (last visited Feb. 8, 2015).

<sup>39</sup> See Stuart Fuller, *Why Are Brands Yet to Wake Up to the Dawn of the New Internet?*, WORLD INTELL. PROP. REV., (June 1, 2014), <http://www.worldipreview.com/article/why-are-brands-yet-to-wake-up-to-the-dawn-of-the-new-internet>.

One of the motivating concepts behind the gTLD expansion is that space in the traditional gTLDs was artificially scarce, and that the capacity for online identity formation suffers as a result.<sup>40</sup> With more than 90 million domain names registered in the .COM extension alone, one's ability to register a descriptive, memorable, yet pithy domain name increasingly is limited. Proponents of the new domain name extensions argue that online space is infinite—unlike real property—and so no compelling rationale for artificially constraining it exists. On its web site, Donuts, Inc.—a leading supporter of the new domain names—analogyzes the movement as going from black-and-white to color:

This new taxonomy will allow domain names to be instantly recognizable and understood. You'll start to see—and be able to purchase—domain names like soho.boutique or diva.boutique, instead of divaboutiqueshonyc.com. And you'll know exactly what you're going to find on smiths.plumbing and smiths.dental. These short, specific domain names will offer improved navigation, increased diversity, and expanded choice.<sup>41</sup>

Others are less optimistic about the utility of these new extensions, arguing that the only people likely to benefit from the expansion are attorneys and marketers, who stand to earn fees based on their ability to help their clients understand and navigate these new virtual spaces.<sup>42</sup> For brands that have carefully cultivated their image online, detractors argue that the new extensions simply create more boundaries to police, patrol, and manage. Should Coca-Cola apply to create the extension .COKE?<sup>43</sup> What about registering second-level domain names in seemingly relevant new extensions, like <coke.beverage> or <coke.drink>? ICANN's founding chairperson, and a critic of the expansion, voiced her concern as follows: "The problem is not the shortage of space in the field of all possible names, but the subdivision of space in Coca-Cola's cultivated namespace."<sup>44</sup>

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<sup>40</sup> See Bob Samuelson, *A Level Playing Field Required*, WORLD INTELL. PROP. REV. (June 6, 2014), <http://www.worldipreview.com/article/a-level-playing-field-required>.

<sup>41</sup> See DONUTS, *supra* note 37.

<sup>42</sup> Esther Dyson, *What's In a Domain Name?*, PROJECT SYNDICATE (Aug. 25, 2011), <http://www.project-syndicate.org/commentary/what-s-in-a-domain-name-> (arguing that "[t]he problem is that expanding the namespace—allowing anyone to register a new TLD such as .apple—doesn't actually create any new value").

<sup>43</sup> In fact, the Coca-Cola company did not apply for .COKE, or any other extension, as of the first round of applications. See *New gLTD Current Application Status*, ICANN NEW GENERIC TOP-LEVEL DOMAINS, <https://gtldresult.icann.org/application-result/applicationstatus/viewstatus> (last visited Feb. 8, 2015).

<sup>44</sup> Dyson, *supra* note 42.

This concern touches on an inescapable reality regarding domain name space: just like trademarks, domain names convey meaning to Internet users, and thus people expect trademarks to be predictably reflected in domain names. Mischief often results, however, for quite simple reasons: (1) anyone willing to pay a minimal registration fee can register his own domain name in unrestricted TLDs, such as the .COM, .NET, or .ORG extensions, and (2) registrars in unrestricted extensions require no proof from applicants that applicants are within their legal rights to register a given domain name incorporating a trademark.<sup>45</sup> In light of these features of the DNS, savvy companies often defensively register a variety of domain names that consumers might use to locate them online, and then seek to capture any other domain names they believe they have claim to, but that already are registered by others.<sup>46</sup> Otherwise, companies risk ceding domain name space that references them or incorporates their trademarks to other entities, whose claims to that space may only grow in strength over time.

With these realities in mind, the allure of having but one domain name registration in a restricted, dedicated space that at once conveys authenticity and legitimacy seems compelling. Unlike purely commercial concerns, forced to proactively register dozens of domain names across a variety of unrestricted domain name extensions, registrants in restricted extensions do not face the same compulsion to cover-the-board with proactive domain name registrations. Only those who meet eligibility criteria can register space in restricted extensions, and registrations outside of a restricted extension may be superfluous, given that the value of a restricted extension is the sense of authenticity and legitimacy it conveys, by virtue of its exclusivity, to those with space within the extension. Incidentally, authenticity and legitimacy are what many in higher education were given, in the form of the .EDU extension, from the beginning days of the Internet, well before others lobbied ICANN to expand the root zone to better define their commercial domains.

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<sup>45</sup> See Manheim & Solum, *supra* note 7.

<sup>46</sup> See *infra* note 323 and accompanying text.

*B. The History of the .EDU Extension: Identity Formation and the Quest for Authenticity and Legitimacy*

The generic top-level domain name extension .EDU was born in April of 1985, when the fledgling Internet's technical architects delegated registrations in the space to six American universities: Carnegie Mellon University, Columbia University, University of California-Berkeley, Purdue University, Rice University, and University of California-Los Angeles.<sup>47</sup> Originally, educational institutions anywhere in the world were permitted to register in the .EDU extension, although these requirements would change over time. By July 1994, 1,292 .EDU domain names existed.<sup>48</sup> That number grew to 2,463 by February 1996.<sup>49</sup> As of 2014, 7,457 domain names exist in the .EDU extension—only 30 more than were registered in 2004.<sup>50</sup> These domain names represent less than 1% of all domain names registered in the world, in any extension.<sup>51</sup>

The National Science Foundation (NSF) was the first governmental entity with oversight function over the .EDU extension.<sup>52</sup> As it did with some of the other gTLDs then in existence (e.g., .COM, .NET, and .ORG), the NSF contracted with a company called Network Solutions to maintain the registry and assign space in it.<sup>53</sup> Colleges and universities did not even have to pay a registration fee for registering extensions in the .EDU space, as the NSF paid these fees on institutions' behalf.<sup>54</sup> This

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<sup>47</sup> Bill Toland, *How Pittsburgh Avoided the Same Fate As Detroit. It Was A Sometimes Rough Transition, But the City Has Made the Transition from Heavy Industry to Its New Place as the Silicon Valley of the East*, PITT. POST-GAZETTE, Oct. 13, 2013, at T1, available at 2013 WLNR 25660755.

<sup>48</sup> MUELLER, *supra* note 18, at 110.

<sup>49</sup> *Id.*

<sup>50</sup> See *Average Counts of .EDU Domains by Status and Year*, EDUCAUSE, [http://net.educause.edu/edudomain/report\\_graph.asp?Type=DOMAIN](http://net.educause.edu/edudomain/report_graph.asp?Type=DOMAIN) (last visited Feb. 8, 2015). Only approximately one-third of all .EDU domain names have been registered since EDUCAUSE took over management of the .EDU extension in 2001. See *POLICY PROPOSALS FOR THE .EDU DOMAIN*, EDUCAUSE 1 (2012), available at [http://net.educause.edu/edudomain/policy\\_board\\_2\\_28\\_2012.pdf](http://net.educause.edu/edudomain/policy_board_2_28_2012.pdf).

<sup>51</sup> See Fuller, *supra* note 39, at 64 (noting that there were 265 million domain names registered in the world through the end of September 2013).

<sup>52</sup> See Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 198-99 (2000).

<sup>53</sup> *Id.*; see also Brooks, *supra* note 15, at 311.

<sup>54</sup> See David L. Wilson, *Colleges Won't Have to Pay New \$50 Fee for Internet Addresses*, CHRON. HIGHER EDUC., Sept. 22, 1995, at A39, available at <http://chronicle.com/article/Colleges-Wont-Have-to-Pay-New/96300/>; see also *ITU to Serve As 'Depository' for Internet Domain MOU*, TR DAILY, Apr. 25, 1997, available at 1997 WLNR 6830785 (noting that "NSF has continued to pay the fees for the '.gov' and '.edu' domain names").



arrangement lasted through 1998, even after oversight of the DNS had passed from the NSF to the U.S. Department of Commerce.

Meanwhile, the federal government was actively looking to hand off responsibility for the DNS to a non-profit entity, partly in response to critics of the monopoly over registration services held by Network Solutions and the U.S. government.<sup>55</sup> ICANN filled that role, beginning with a memorandum of understanding signed between it and the federal government in November of 1998.<sup>56</sup>

Incidentally, ICANN's ties to academe run deep. Jonathan B. Postel, formerly a computer scientist at the University of Southern California, was a driving force behind the formation of ICANN, and Tamar Frankel, a law professor at Boston University, oversaw early meetings designed to respond to the federal government's request that a not-for-profit entity be created to perform the technical functions the government no longer wished to coordinate.<sup>57</sup> As a news article in 1998 noted, "Since the Internet's earliest days, control of some network functions has rested largely with a small circle of technical experts like Mr. Postel—most of them at universities."<sup>58</sup> However, Mr. Postel's untimely death required a leadership change, and Michael M. Roberts became ICANN's first president and chief executive in November of 1998.<sup>59</sup> Mr. Roberts was himself a former academic-network leader, a founder of the Internet Society and the Internet2 project, and a former vice president of a predecessor to EDUCAUSE.<sup>60</sup>

The Louisville, Colorado-based EDUCAUSE was formed in 1998 when two groups—Educom and CAUSE—merged.<sup>61</sup>

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<sup>55</sup> See Brooks, *supra* note 15, at 312.

<sup>56</sup> Jay P. Kesan & Andres A. Gallo, *The Market for Private Dispute Resolution Services—An Empirical Re-Assessment of ICANN-UDRP Performance*, 11 MICH. TELECOMM. TECH. L. REV. 285, 290 (2005).

<sup>57</sup> See MUELLER, *supra* note 18, at 3; John Postel, WIKIPEDIA, [http://en.wikipedia.org/wiki/Jon\\_Postel](http://en.wikipedia.org/wiki/Jon_Postel) (last visited Feb. 8, 2015).

<sup>58</sup> Jeffrey R. Young, *Debate Flares Over Group That Hopes to Oversee the Internet*, CHRON. HIGHER EDUC. (Nov. 27, 1998), <http://chronicle.com/article/Debate-Flares-Over-Group-That/27491/>; see also MUELLER, *supra* note 18, at 103 (noting that "the technical community deferred to Jon Postel when it came to names and numbers").

<sup>59</sup> Young, *supra* note 58. Professor Milton Mueller describes Roberts's ascendancy as ICANN's first president as preordained by Postel. See MUELLER, *supra* note 18, at 179, 181. When Postel died of a heart attack in October of 1998, Mueller writes that ICANN was "robbed . . . of its moral center, a good part of its institutional memory, and most of what remained of its legitimacy." *Id.* at 181.

<sup>60</sup> See *Leader Named for Group Likely to Assume Internet-Address Registrations*, CHRON. HIGHER EDUC. (Nov. 6, 1998), <http://chronicle.com/article/Leader-Named-for-Group-Likely/17222/>; see also MUELLER, *supra* note 18, at 95.

<sup>61</sup> See *Cause History*, EDUCAUSE, <http://www.educause.edu/about/mission-and-organization/history/cause-history> (last visited Mar. 6, 2015).

From its earliest days, EDUCAUSE represented a consortium of colleges, universities, and businesses involved with academic computing. The organization urged the federal government, as early as December of 1997, to allow it to operate the .EDU extension.<sup>62</sup> But the government delayed peeling off operation of the .EDU registry from Network Solutions until it had finalized its deal with ICANN. This delay meant that Network Solutions was left to enforce government regulations of the .EDU space from 1993 that dictated that only “four-year, degree-granting colleges and universities” could register .EDU domain names.<sup>63</sup>

Most four-year institutions had claimed .EDU domain names by the late 1990s.<sup>64</sup> Facing more than 1,500 requests to register .EDU domain names in 1999, Network Solutions permitted registration of fewer than 10% of the requests.<sup>65</sup> However, eligibility criteria were not applied evenly, which led to some individuals registering .EDU domain names for organizations that did not meet the stated criteria.<sup>66</sup> For example, even though it did not offer four-year degrees, Miami-Dade Community College was able to secure a .EDU registration, as were about 200 other community colleges.<sup>67</sup> However, the majority of the over 1,000 community colleges operating at that time used other top-level extensions, like .US or .COM, for their institution’s web site, either because they were unable to obtain a .EDU registration or because the eligibility criteria dissuaded them even from trying.<sup>68</sup>

Being forced to use a .COM extension for a community college’s web site, instead of .EDU, may seem like a minor concern, but in reality many students, faculty, and administrators within those institutions acutely felt the distinction. As one faculty member at a community college expressed at the time, use

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<sup>62</sup> Jeffrey R. Young, *Academic-Technology Consortium Continues Push to Take Charge of ‘.edu’ Domain*, CHRON. HIGHER EDUC. Sept. 3, 1999, at A53, available at <http://chronicle.com/article/Academic-Technology-Consortium/1904/>.

<sup>63</sup> *Id.*

<sup>64</sup> See, e.g., Mark Edelen, *Campus Info Is Just a Tap Away for Parents*, VIRGINIAN-PILOT & LEDGER STAR, Aug. 25, 1997, at D5, available at 1997 WLNR 2196974 (noting that “[u]niversities claimed early territory on the Web”).

<sup>65</sup> Young, *supra* note 62.

<sup>66</sup> Gwendolyn Bradley, *Community Colleges to Get ‘.edu’ Domain Name*, ACADEME, June 2001, at 8 (noting that “Network Solutions was criticized, however, for applying the rules inconsistently”).

<sup>67</sup> Young, *supra* note 62; see also Kenneth J. Cooper, *Community Colleges Fight for Net Legitimacy*, CHICAGO SUN TIMES, Nov. 27, 2000, at 24, available at 2000 WLNR 10679074.

<sup>68</sup> Jeffrey R. Young, *Community Colleges Step Up Fight to Use ‘.edu’ Internet Addresses*, CHRON. HIGHER EDUC. Dec. 8, 2000, at A39, available at <http://chronicle.com/article/Community-Colleges-Step-Up/7411/>.

of the .COM instead of .EDU made her feel as though she worked for a business, not a college.<sup>69</sup> Compounding this sense of misalignment was the fact that while most community colleges were kept out of the .EDU space, some entities that were not even colleges at all had been permitted to register a .EDU domain name, due to error or oversight by Network Solutions in reviewing applications. For example, to this day, <australia.edu> resolves to a web page that provides information to non-Australians about study abroad options in the Down Under.<sup>70</sup> EDUCAUSE itself—which indubitably is not a degree-granting institution—was permitted a domain name in the .EDU extension, even before it assumed control of the registry.<sup>71</sup> Whether entirely accurate or not, an official with Network Solutions told a reporter for the *Chronicle of Higher Education* in 1997 that a .EDU address “is given to anyone who asks for it.”<sup>72</sup> Eventually, however, EDUCAUSE purged from the root zone some, but not all, of the domain names that had been registered in blatant violation of the criteria, such as <allison.edu>, <geraldine.edu>, <oracle.edu>, and <jedi.edu>.<sup>73</sup>

Flummoxed by the seemingly capricious nature of who was permitted to register in the .EDU extension, the American Association of Community Colleges wrote to the Department of Commerce in October of 2000, stating that it was “extremely frustrated by [its] inability to routinely access the .edu domain,” which it alleged conveys extraordinary symbolic resonance.<sup>74</sup> As the group’s president observed to a national newspaper reporter, “Some people have not given community colleges the kind of status they deserve . . . . This is sending the same message.”<sup>75</sup> The group also reiterated the call to turn operation of the .EDU registry over to EDUCAUSE.<sup>76</sup> However, a year later,

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<sup>69</sup> Jeffrey R. Young, *Community Colleges Want a More Eminent Domain*, CHRON. HIGHER EDUC., Jan. 26, 2001, at A41, available at <http://chronicle.com/article/Community-Colleges-Want-a-More/14025/>.

<sup>70</sup> EDUCAUSE has described <australia.edu> this way: “[its] sole functions are to offer free .edu email addresses to anyone and to link to various public documents about student travel to Australia.” POLICY PROPOSALS FOR THE .EDU DOMAIN, *supra* note 50, at 2.

<sup>71</sup> Joseph Georges, *Putting the ‘Education’ Back Into ‘edu.’* CHRON. HIGHER EDUC., Oct. 4, 2002, <http://chronicle.com/article/Putting-the-Education-Back/16174/>.

<sup>72</sup> Lisa Guernsey, *Is the Internet Becoming a Bonanza for Diploma Mills?*, CHRON. HIGHER EDUC., Dec. 19, 1997, at A22, available at <http://chronicle.com/article/Is-the-Internet-Becoming-a/101045/>.

<sup>73</sup> Doug Mehus, *EDUCAUSE Prepares Mass Purge of .EDU Domains*, CIRCLEID (Oct. 9, 2003, 10:51 AM), [http://www.circleid.com/posts/educause\\_prepares\\_mass\\_purge\\_of\\_edu\\_domains/](http://www.circleid.com/posts/educause_prepares_mass_purge_of_edu_domains/).

<sup>74</sup> Young, *supra* note 68 (internal quotation marks omitted).

<sup>75</sup> Cooper, *supra* note 67 (internal quotation marks omitted).

<sup>76</sup> Young, *supra* note 68.

community colleges continued to be excluded from the .EDU extension, which community college leaders continued to find infuriating and insulting.<sup>77</sup>

Finally, on October 29, 2001, the Department of Commerce engaged EDUCAUSE to operate the .EDU registry.<sup>78</sup> EDUCAUSE's current agreement with the Department of Commerce to operate the .EDU registry extends through September 30, 2016.<sup>79</sup> Under the terms of the agreement, EDUCAUSE can determine eligibility criteria for institutions of higher education seeking to register in the extension.<sup>80</sup> Soon after taking over management of the extension, the group opened up the .EDU space for registration to two-year institutions, or community colleges.<sup>81</sup> From the beginning of its management of the extension, EDUCAUSE recognized the power of the .EDU to signify authenticity and legitimacy for those operating within higher education. As the organization's vice-president wrote at the time,

[T]he .edu domain name of a campus is important as a way of stating that an institution is a recognized member of the higher education community and that the institution meets the community's standards of degrees and accreditation. This sign of recognition will be all the more critical as more and more teaching and learning is conducted through the Internet via "e-learning."<sup>82</sup>

EDUCAUSE also promulgated a rule that no eligible institution could register more than one .EDU domain name, which only underscored the scarcity and importance of each individual domain name registration.<sup>83</sup>

<sup>77</sup> Jeffrey R. Young, *Educause Will Gain Control of the 'edu' Internet Domain*, CHRON. HIGHER EDUC., Apr. 27, 2001, at A46, available at <http://chronicle.com/article/Educause-Will-Gain-Control-of/33006/>.

<sup>78</sup> Jeffrey R. Young, *Commerce Department Hands Over 'edu' Domain to Educause*, CHRON. HIGHER EDUC., Nov. 9, 2001, at A53, available at <http://chronicle.com/article/Commerce-Department-Hands-Over/20208/>.

<sup>79</sup> See *Policy Information*, EDUCAUSE, <http://net.educause.edu/edudomain/policy.asp>, (last visited Feb. 8, 2015).

<sup>80</sup> *Id.*

<sup>81</sup> See Mark Luker, *The .edu Domain and EDUCAUSE*, EDUCAUSE REV., Sept./Oct. 2001, at 64, available at <https://net.educause.edu/ir/library/pdf/ERM015A.pdf>.

<sup>82</sup> *Id.*; see also *Dot Who? They Say They Want to Use .edu, Too, Which Is Reserved for Four-Year Colleges*, GRAND RAPIDS PRESS, Feb. 28, 2001, at F4, available at 2001 WLNR 10069248 (noting that many community college leaders felt .EDU extension is "necessary for educational legitimacy," and that the .EDU extension has a kind of prestige associated with it).

<sup>83</sup> However, EDUCAUSE's policy board recently endorsed a proposal that would permit eligible institutions that do not currently have more than one .EDU domain name to register a second domain name, provided it is "associated with the entire entity and not just a subunit" (e.g., a school or department within a university). See Memorandum from Gregory A. Jackson, Vice President, EDUCAUSE, to Policy

The hand off of .EDU operations from VeriSign (the corporate successor to Network Solutions) to EDUCAUSE was not without its glitches. In December of 2001, .EDU registrants received errant renewal notices from VeriSign, asking registrants to pay \$70 to renew their .EDU domain name registrations.<sup>84</sup> EDUCAUSE, which initially charged no registration or renewal fees, had to assuage the concerns of network administrators at institutions receiving the mistaken bills, many of whom were alarmed by them and took them as a sign that the new registry operator was inept.<sup>85</sup>

EDUCAUSE's agreement with the Department of Commerce was amended in several important ways during the early years of the relationship. For example, in 2003, operating policies were established that "[n]ames in the .edu top-level domain, regardless of when issued, may not be transferred in any way," effectively eviscerating any secondary markets for the buying, trading, or selling of .EDU space.<sup>86</sup> In 2006, the agreement again changed, this time to permit EDUCAUSE to charge registrants a \$40 annual fee to help cover its administrative expenses in managing the extension.<sup>87</sup>

As EDUCAUSE worked to fortify the legitimacy of the .EDU extension, questions continued to arise as to which types of institutions should be eligible to register domain names in the space. EDUCAUSE's initial policy, promulgated in 2001, was that would-be registrants had to (1) grant degrees, and (2) be accredited by one of six major regional accrediting bodies.<sup>88</sup> These rules, however, excluded educational institutions or entities that do not grant degrees (such as paralegal certificate programs, or state university systems or coordinating bodies), or that grant degrees but are accredited by a national accrediting group (such as for-profit, online-only institutions) or other accrediting organizations (such as bible colleges, chiropractic schools, and midwifery institutes).<sup>89</sup> Advocates for opening the doors of the .EDU extension to such institutions argued that the

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Board for .edu 1 (Aug. 17, 2012), available at [http://net.educause.edu/edudomain/policy\\_board\\_9\\_26\\_2012.pdf](http://net.educause.edu/edudomain/policy_board_9_26_2012.pdf).

<sup>84</sup> Jeffrey R. Young, *Colleges Incorrectly Billed for Domains*, CHRON. HIGHER EDUC., Jan. 25, 2002, at A32, available at <http://chronicle.com/article/Colleges-Incorrectly-Billed/31487/>.

<sup>85</sup> *Id.*

<sup>86</sup> *Policy Information*, *supra* note 79.

<sup>87</sup> *Id.*

<sup>88</sup> Dan Carnevale, *Educause Considers Letting More Colleges Use '.edu' Addresses*, CHRON. HIGHER EDUC., July 19, 2002, at A31, available at <http://chronicle.com/article/Educause-Considers-Letting/35361/>.

<sup>89</sup> *Id.*

public associates a .EDU address with legitimate institutions, whereas .COM domain names used for educational purposes connote diploma mills and fly-by-night operations.<sup>90</sup>

Advocates for loosening the .EDU eligibility requirements also rightfully pointed out that many institutions not affiliated with American higher education had been able to register .EDU domain names when Network Solutions controlled the extension, in contravention of then-existing registration eligibility requirements.<sup>91</sup> These domain names were grandfathered in to the new eligibility requirements established by EDUCAUSE, causing “great complexity at the borders of .edu policy enforcement.”<sup>92</sup> Thus, high schools, foreign universities, and even entities with no tie to education at all were found to be operating in the .EDU space once EDUCAUSE took over, even though official policy stated that American institutions that granted degrees, but were not accredited by one of six regional accrediting agencies, were prevented from registering domain names in the extension.<sup>93</sup>

After extensive public comment on the eligibility requirements, EDUCAUSE and the Department of Commerce changed them in February of 2003. The new rule for .EDU registration, which continues to apply, permits any U.S. institution that is accredited by an agency recognized by the U.S. Department of Education to register a domain name in the .EDU extension.<sup>94</sup> This rule change effectively opened the door for midwifery institutes, cosmetology schools, funeral service schools, and other vocational training institutions to enter the extension. Many considered this development an equalizing force for postsecondary education, or in short, “a wonderful way of leveling the playing field.”<sup>95</sup> Additionally, since 2004, “[u]niversity system offices, state coordinating offices or boards,

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<sup>90</sup> *Id.*

<sup>91</sup> See *supra* notes 70-73 and accompanying text.

<sup>92</sup> See POLICY PROPOSALS FOR THE .EDU DOMAIN, *supra* note 50, at 2.

<sup>93</sup> See Georges, *supra* note 71 (noting that, as of 2002, <deerfield.org> was used by a high school, <oxford.edu> was used by Oxford University, and <orchestra.edu> was used by an Italian jazz orchestra, among other examples).

<sup>94</sup> Dan Carnevale, *Educause Will Open ‘.edu’ Domain to a Wide Range of Specialized Institutions*, CHRON. HIGHER EDUC., Feb. 28, 2003, at A35, available at <http://chronicle.com/article/Educause-Will-Open-edu/25060/>. However, “institutional accreditation is required for .edu eligibility; program accreditation is not sufficient.” *Policy Information*, *supra* note 79.

<sup>95</sup> Anick Jesdanun, *Schools Get .edu Sites*, DESERET NEWS (Feb. 12, 2003, 12:40 PM), <http://www.deseretnews.com/article/964497/schools-get-edu-sites.html?pg=all> (quoting Michael P. Lambert, the executive director of the Distance Education and Training Council) (internal quotation marks omitted).

community college district offices, or equivalent entities located within the United States which have as their principal activity the management and governance of a collection of 'Accredited Institutions' that themselves meet the eligibility criteria for .EDU" have been permitted to register a domain name in the .EDU extension.<sup>96</sup>

The question of legitimacy of .EDU domain names continued to plague EDUCAUSE, perhaps in part because of the broadening of the eligibility requirements for registering in the extension. In November of 2004, the *Chronicle of Higher Education* published an article highlighting the plight of a would-be student who almost wrote a \$5,000 check to an alleged diploma mill operating a web site in the .EDU extension.<sup>97</sup> She mistakenly perceived the institution's .EDU address as a sign of proper accreditation.<sup>98</sup> Others perpetuated the belief that organizations operating in the .EDU extension are bona fide schools that do not sell fake degrees.<sup>99</sup>

EDUCAUSE rebuffed requests that it audit all existing .EDU domain names and delete registrations if the registrant did not meet current eligibility requirements.<sup>100</sup> The organization pointed out that institutions' accreditation status can change (i.e., an accredited college could lose accreditation, then gain it back), as can the status of accrediting agencies (i.e., approval by the Department of Education could exist one day, then be lost the next).<sup>101</sup> In light of the fluid nature of accreditation, EDUCAUSE decided not to strip institutions of their domain name when they might actively be trying to regain their accredited status.

Others continued to criticize EDUCAUSE for this position. As one critic pointed out, "There's a widespread belief that .edu means something."<sup>102</sup> The concept of the .EDU domain meaning something was not lost on individual colleges and universities. Many sought to fully capture that meaning, offering their alumni access to their own personal .EDU email

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<sup>96</sup> *Policy Information*, *supra* note 79.

<sup>97</sup> Dan Carnevale, *Don't Judge a College by Its Internet Address*, CHRON. HIGHER EDUC., Nov. 26, 2004, at A29, available at <http://chronicle.com/article/Dont-Judge-a-College-by-Its/8748/>.

<sup>98</sup> *Id.*

<sup>99</sup> *Cf.* Whyte, *supra* note 26 ("[U]nderstanding domain names will help you distinguish between bona fide schools and companies selling fake degrees. If the organisation does not have a .edu domain name, be very wary!").

<sup>100</sup> Carnevale, *supra* note 97.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

address for life.<sup>103</sup> Some institutions have found that providing lifetime email addresses to alumni is “a powerful tool” for keeping graduates engaged.<sup>104</sup> Those proud of their alma maters also consider the email addresses as a signaling device, or “subtle resume.”<sup>105</sup>

While lifelong affiliation with one’s alma mater has its price (namely, the cost of tuition), the associational value between the institution and users of its domain name has a price of its own. Indeed, some profiteers in China sell .EDU email addresses on an eBay-like auction site for hundreds of dollars each, thereby capitalizing on the perceived value and authenticity that accompanies emails sent from high-prestige universities reflected in the .EDU space.<sup>106</sup>

Regardless of these practices, as online infrastructure has matured—and users’ comfort level with the medium has deepened—some within the higher education community have questioned whether “the tail end of a web address really matter[s]” all that much.<sup>107</sup> Web browsers now are programmed to complete common URL addresses even before the user has finished typing them, and colleges and universities themselves have bought up various .COM, .ORG, and .NET domain names to serve particular programmatic or marketing-related needs.<sup>108</sup> The new gTLDs approved by ICANN will require institutions to continue to evaluate how they wish their presence to be reflected online, and to what extent the .EDU domain will remain used as it was intended: not only as special space, but also the primary space in which colleges and universities operate online.

### C. *Adjudicating Domain Name Disputes under the UDRP and the ACPA*

Two primary legal vehicles exist for trademark holders to resolve claims related to the allegedly improper ownership and use of domain names by third parties: the UDRP action and

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<sup>103</sup> *Universities Offer Graduates an E-Mail Place to Call Home*, MILWAUKEE J. SENTINEL, May 8, 2001, at 02M, available at 2001 WLNR 2942169.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *University Email Accounts for Sale in China*, INSIDE HIGHER ED (Sept. 9, 2014), <https://www.insidehighered.com/quicktakes/2014/09/09/university-email-accounts-sale-china>.

<sup>107</sup> Josh Fischman, *Trading In ‘edu’ for ‘com,’* CHRON. HIGHER EDUC.: WIRED CAMPUS BLOG (Sept. 2, 2011), <http://chronicle.com/blogs/wiredcampus/trading-in-edu-for-com/33033>.

<sup>108</sup> *Id.* (noting Weber State University’s use of <getintoweber.com> for recruitment and admissions purposes).



federal court litigation. Both provide remedies for mark holders aggrieved when a third party—often labeled a “cybersquatter” by the mark holder—registers and uses a confusingly similar domain name in bad faith.<sup>109</sup> While federal court litigation over domain names may include traditional claims of trademark infringement and trademark dilution, this subsection discusses only the statutory cause of action for cybersquatting that Congress created in the late 1990s specifically to address the problem.<sup>110</sup>

### 1. The UDRP

Procedurally, a UDRP action is initiated when a complainant mark holder submits a formal complaint to an ICANN-approved dispute resolution provider.<sup>111</sup> Complainants may choose which provider to use, a critical option that some have alleged creates “an incentive for providers to favor complainants in their decisions.”<sup>112</sup> The provider’s initial task is to determine if the complaint complies with applicable administrative rules and any supplementary rules of the provider.<sup>113</sup> For example, the

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<sup>109</sup> See Lipton, *supra* note 5, at 1363-64 (arguing that “[w]hile ACPA and the UDRP are extremely useful and effective in protecting trademark interests in the bad faith cybersquatting context, they are very limited in their ability to deal with disputes between two legitimate holders of similar trademarks with respect to a corresponding Internet domain name”); see also MUELLER, *supra* note 18, at 67 (“[T]he application of trademark law, which was national in scope and industry- and use-specific, to domain names, which were global in scope and were governed primarily by a uniqueness requirement, created as many conflicts as it resolved.”).

<sup>110</sup> See LIPTON, *supra* note 12, at 24 (noting that trademark infringement, dilution, and ACPA claims often are pleaded in the alternative). Professor Lipton also notes that “the awkwardness of applying existing trademark doctrines to cybersquatting” prompted Congress to enact ACPA, and for ICANN to promulgate the UDRP. *Id.* at 272. The awkwardness stems from the fact that bad faith registration and use of a domain name may not confuse consumers (the *sine qua non* of trademark infringement actions), nor does such activity necessarily constitute use of a trademark in commerce. For an example of one known instance involving a university suing a defendant for trademark infringement and violation of the ACPA, see *Ohio St. Univ. v. Thomas*, 738 F. Supp. 2d 743, 748, 757 (S.D. Ohio 2010) (granting preliminary injunction and temporary restraining order to university on trademark infringement claim while declining to address university’s ACPA claim).

<sup>111</sup> Kesan & Gallo, *supra* note 56, at 298. Currently, five ICANN-approved providers exist. The first two authorized providers were the World Intellectual Property Organization and the National Arbitration Forum, which both were approved in December of 1999. *Id.* at 312. Two additional providers, eResolution and CPR Institute for Dispute Resolution, were approved in 2000, but each of these subsequently lost its approval. In 2002, ICANN approved a new provider, Asian Domain Name Dispute Resolution Centre. Additional providers include the Czech Arbitration Court Arbitration Center for Internet Disputes (approved 2009) and the Arab Center for Domain Name Dispute Resolution (approved 2013). See *List of Approved Dispute Resolution Service Providers*, ICANN, <http://www.icann.org/en/help/dndr/udrp/providers> (last visited Mar. 6, 2015).

<sup>112</sup> Kesan & Gallo, *supra* note 56, at 299.

<sup>113</sup> *Id.* at 303.

UDRP only applies to domain names existing in 1 of 16 gTLDs (the .EDU is not one of them).<sup>114</sup> Assuming all basic filing requirements are met, the provider submits the complaint to the respondent, who then has 20 days to respond.<sup>115</sup> If a timely response is submitted, the provider submits the complaint and response to the appointed panel (which consists of one arbitrator or a three-arbitrator group, depending on the complainant's election).<sup>116</sup> Even if no response is submitted, the complaint is forwarded to the appointed panel, which need not consider UDRP precedent in reaching its decision.<sup>117</sup>

Substantively, in order to prevail under the UDRP, a complainant must show that (1) the domain name at issue is identical or confusingly similar to a mark in which the complainant has rights (these rights need not be in the form of a federal trademark registration, but often and ideally are); (2) the respondent has no rights or legitimate interests in the domain name; and (3) the domain name has been registered and is being used in bad faith.<sup>118</sup> Evidence of registration and use in bad faith, which often is the most hotly disputed of the three elements, can take many forms, including circumstances suggesting that: the respondent registered the domain name in order to prevent the complainant from reflecting the mark in a corresponding domain name; the respondent registered the domain name primarily for the purpose of disrupting the complainant's business; in using the domain name, the respondent intentionally attempted to attract Internet users to a web site by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the web site.<sup>119</sup>

ICANN created the UDRP in 1999, with an effective date of January 3, 2000, after months of consultation with various interest groups, including the World Intellectual Property Organization.<sup>120</sup> The UDRP was promulgated against the

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<sup>114</sup> See *Domain Name Dispute Resolution Policies*, ICANN, <https://www.icann.org/resources/pages/dndr-2012-02-25-en> (last visited Feb. 8, 2015).

<sup>115</sup> Kesan & Gallo, *supra* note 56, at 303.

<sup>116</sup> *Id.* The single-person arbitrator is selected at random by the provider, while three-person panels are selected with input from the complainant, the respondent, and the provider.

<sup>117</sup> *Id.*; Bearby & Siegal, *supra* note 24, at 656.

<sup>118</sup> See *Uniform Domain Name Dispute Resolution Policy*, ICANN, § 4(a), <http://www.icann.org/en/help/dndr/udrp/policy> (last visited Feb. 8, 2015) [hereinafter *UDRP Policy*].

<sup>119</sup> *Id.* at § 4(b).

<sup>120</sup> See WIPO, *THE MANAGEMENT OF INTERNET NAMES AND ADDRESSES; INTELLECTUAL PROPERTY ISSUES: FINAL REPORT OF THE WIPO INTERNET DOMAIN*

background of an existing dispute settlement policy administered by Network Solutions that stakeholders widely considered inadequate.<sup>121</sup> The UDRP has been described as “a decentralized regime for dispute resolution in which ICANN created the general rules and authorized a series of competing private providers to manage and resolve disputes.”<sup>122</sup> ICANN required gTLD registries to adopt the UDRP.<sup>123</sup> In order to effectuate this, the registries, in turn, were made to require registrars selling domain name space within their extension to incorporate the UDRP into the standard registration agreement between registrars and end-purchasers of domain names.<sup>124</sup> Jurisdiction is therefore contractual: by purchasing a domain name, a registrant agrees that any dispute concerning the registrant’s rights in the domain name is subject to UDRP arbitration.<sup>125</sup> Registries agree to enforce UDRP decisions by approved providers no sooner than 10 days after issuance.<sup>126</sup> The 10 days affords a losing respondent the opportunity to file a lawsuit in court. If such action is taken, the registry will not act on the panel’s decision, pending resolution of the court case.<sup>127</sup>

The UDRP, as a form of alternative dispute resolution, fills a void created by the inadequacy of courts to predictably handle disputes over domain name ownership. With disputing parties often not subject to the same legal jurisdiction,

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NAME PROCESS (Apr. 30, 1999), available at <http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>; *UDRP Policy*, *supra* note 118.

<sup>121</sup> Roberta L. Horton & Seth I. Heller, *What’s In a Name? Trade Name Protection Under the Uniform Domain Name Dispute Resolution Policy*, 19 BLOOMBERG BNA: ELECTRONIC COM. & L. REP. 514 (May 12, 2014), available at [http://www.arnoldporter.com/public\\_document.cfm?u=WhatsinaNameTradeNameProtectionUndertheUniformDomainNameDisputeResolutionPolicy&id=23637&key=12H1](http://www.arnoldporter.com/public_document.cfm?u=WhatsinaNameTradeNameProtectionUndertheUniformDomainNameDisputeResolutionPolicy&id=23637&key=12H1). Essentially, Network Solutions’s dispute policy was “to stay out of domain name disputes except to the extent necessary to protect [the company’s] interests.” Julia B. Strickland & Scott M. Pearson, *Internet Litigation-Domain Names-Trademarks-Cyberlaw: Resolution of Disputes Over Internet Domain Names*, MONDAQ BUS. BRIEFING, Apr. 6, 1999, available at 1999 WLNR 5130021 (describing how the policy functioned); *see also* MUELLER, *supra* note 18, at 121 (stating that “the policy routinely produced blatant injustices”).

<sup>122</sup> Kesan & Gallo, *supra* note 56, at 293.

<sup>123</sup> *See* A. Michael Froomkin, *ICANN’s ‘Uniform Dispute Resolution Policy’—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 612 (2002) (“[ICANN’s] power to make and break registries allows ICANN to require registries (and also registrars) to promise to subject all registrants to a mandatory third-party beneficiary clause in which every registrant agrees to submit to ICANN’s UDRP upon the request of aggrieved third parties who believe they have a superior claim to the registrant’s domain name.”).

<sup>124</sup> *See* Lipton, *supra* note 5, at 1372 (“[A]ll domain name registrants are contractually bound to submit to a mandatory arbitration under the UDRP . . .”).

<sup>125</sup> *See* MUELLER, *supra* note 18, at 192.

<sup>126</sup> *See UDRP Policy*, *supra* note 118, § 4(k).

<sup>127</sup> *Id.*

enforcement of court verdicts poses difficulties.<sup>128</sup> Furthermore, the expense and slow speed of litigation makes it an unattractive dispute resolution vehicle for many parties wishing to resolve Internet domain name disputes cheaply and quickly.<sup>129</sup> In contrast to litigation, UDRP proceedings do not involve discovery or in-person hearings, and no money damages are available for prevailing complainants.<sup>130</sup> A decision is rendered within 60 days of filing.<sup>131</sup> According to a 2012 survey conducted by the American Intellectual Property Law Association (AIPLA), the mean cost to clients in legal fees to have a lawyer prepare a UDRP complaint is \$1,876, although the cost can be as high as \$5,000 for some firms and in some markets.<sup>132</sup> Others choose to proceed without the aid of an attorney, which the UDRP rules permit.<sup>133</sup> The UDRP's chief selling points, therefore, are that it is an international, non-governmental, relatively inexpensive, fast, and essentially online-only dispute resolution vehicle.<sup>134</sup>

Providers have seen an uptick in the number of UDRP actions filed each year.<sup>135</sup> Critics of the UDRP, however, allege that the process is too favorable to complainants.<sup>136</sup> A common critique is that arbitration panels are too lenient in finding bad faith on the part of respondents.<sup>137</sup> Whatever factors come into play in a given arbitration panel's decision, one macroscopic

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<sup>128</sup> Kesan & Gallo, *supra* note 56, at 292.

<sup>129</sup> *Id.* For a detailed description of the general procedure providers follow in adjudicating UDRP disputes, see *id.* at 303.

<sup>130</sup> *UDRP Policy*, *supra* note 118.

<sup>131</sup> See, e.g., *WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP)*, WIPO, <http://www.wipo.int/amc/en/domains/guide> (last visited Feb. 19, 2015).

<sup>132</sup> AIPLA, REPORT OF THE ECONOMIC SURVEY 2013, at I-107. Additionally, the cost of using the arbitration provider can be \$1,300 to \$2,250 for a single-member panel, depending on the number of domain names in dispute. See, e.g., DISPUTE RESOLUTION FOR DOMAIN NAMES: THE NATIONAL ARBITRATION FORUM'S SUPPLEMENTAL RULES TO ICANN'S UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY 10 (July 1, 2010), available at <http://domains.adrforum.com/resource.aspx?id=1556>.

<sup>133</sup> See *Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules")*, ICANN § 3 (Mar. 1, 2010), <https://www.icann.org/resources/pages/rules-be-2012-02-25-en> (noting that complaints may be initiated by the complainant or the complainant's authorized representative).

<sup>134</sup> See Lipton, *supra* note 5, at 1372. That said, one may seek remedy through the UDRP while simultaneously pursuing federal court litigation; the two avenues are not mutually exclusive. See Bearby & Siegal, *supra* note 24, at 655.

<sup>135</sup> See, e.g., WORLD INTELL. PROP. ASS'N, TOTAL NUMBER OF WIPO DOMAIN NAME CASES AND DOMAIN NAMES BY YEAR, available at [http://www.wipo.int/export/sites/www/pressroom/en/documents/pr\\_2014\\_756\\_a.pdf#annex3](http://www.wipo.int/export/sites/www/pressroom/en/documents/pr_2014_756_a.pdf#annex3) (last visited Mar. 31, 2015) (showing the trend in cases from 1,857 filed in 2000, to 2,585 filed in 2013).

<sup>136</sup> See, e.g., MUELLER, *supra* note 18, at 193 ("Procedurally, the UDRP is heavily biased in favor of complainants.").

<sup>137</sup> See, e.g., Brooks, *supra* note 15, at 326 ("[P]anelists have expanded the strict language of the policy when their arbitration panelists have reached the conclusion that a registrant is a 'bad actor.'").

empirical data point merits consideration: respondents win less than 20% of the UDRP proceedings that result in a ruling.<sup>138</sup>

## 2. The Anticybersquatting Consumer Protection Act

The Anticybersquatting Consumer Protection Act (ACPA) provides federal court jurisdiction for a civil cause of action aimed to punish cybersquatters. In order to succeed under the ACPA, a plaintiff must establish that a defendant (1) has a bad faith intent to profit from using a distinctive mark owned by the plaintiff, and (2) has registered, trafficked in, or used a domain name that is identical or confusingly similar to the plaintiff's mark, or dilutive of the plaintiff's mark if the mark is famous.<sup>139</sup> The ACPA identifies 10 non-exclusive statutory bases for finding bad faith intent to profit, including the defendant's bona fide noncommercial or fair use of the mark in a site accessible under the domain name, the defendant's offer to sell the domain name for financial gain without having used it, and the defendant's provision of material and misleading false contact information when applying to register the domain name.<sup>140</sup> To be actionable, the registrant's bad faith need not have been present at the time of registration, but simply must have been present at some time during the registrant's ownership of the domain.<sup>141</sup>

President Bill Clinton signed the ACPA into law on November 29, 1999.<sup>142</sup> Congress enacted the ACPA against a landscape of increased online activity that was hurting established businesses in a way that traditional trademark law was not well equipped to resolve.<sup>143</sup> The ACPA aimed to address the problem of "bad faith and abusive registration of distinctive marks as Internet domain names with the intent to profit from the goodwill associated with such marks."<sup>144</sup> The specific problem boiled down to individuals—often located outside the U.S., and thus beyond its courts' jurisdiction—who would register domain names containing the trademarks of American

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<sup>138</sup> *Id.* at 328; *see also* Horton & Heller, *supra* note 121.

<sup>139</sup> *See* 15 U.S.C. § 1125(d)(1)(A) (2012).

<sup>140</sup> *See id.* § 1125(d)(1)(B)(i).

<sup>141</sup> Bad faith even can occur after a dispute arises, should the registrant offer to settle the dispute by selling the domain name to the complainant for profit. *See* LIPTON, *supra* note 12, at 115.

<sup>142</sup> Karen Kaplan, *Clinton Signs Cybersquatting Law*, L.A. TIMES, Nov. 30, 1999, at 3.

<sup>143</sup> *See* LIPTON, *supra* note 12, at 22.

<sup>144</sup> S. REP. NO. 106-140, at 4 (1999).

companies, then offer to sell them the domain name in a private transaction at a cost well above the seller's minimal expense in obtaining and maintaining the registration. While brand owners contemplated legal action, or the cybersquatter's offer to sell, the domain name often was put to nefarious use, such as automatically redirecting visitors to the web site of the mark owner's prime competitor. In some cases the actual registrant could not be identified, as the registrant had provided false name and contact information to the registrar at the time of registration.<sup>145</sup>

These thorny problems of personal jurisdiction led Congress to include an *in rem* provision in the legislation, in addition to the *in personam* jurisdiction typical of most enabling statutes. Under the *in rem* provision, courts may adjudicate claims to a given domain name provided that the domain name registrar or registry that registered or assigned the domain name is physically present in the court's judicial district.<sup>146</sup> Additionally, in order to proceed under the ACPA's *in rem* prong, the court must be satisfied that the mark owner is not able to obtain *in personam* jurisdiction over a person who otherwise would be the named defendant, or through due diligence was not able to find such a person by (1) sending notice to the registrant at his address listed in WHOIS information for the domain, and (2) publishing notice as the court may direct.<sup>147</sup> The ACPA's *in rem* provision provides mark holders with two key advantages. First, it provides a statutory basis for declaring domain names property rather than merely contractual rights.<sup>148</sup> Second, the only relief contemplated under this provision—i.e., cancellation, forfeiture, or transfer of the domain name<sup>149</sup>—often matters more to mark owners than the prospect of obtaining money damages.

On the subject of money, and in contrast to the UDRP, pursuing an ACPA claim is more expensive because a claimant must use the federal courts to advance such claims. While

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<sup>145</sup> *Id.*

<sup>146</sup> See 15 U.S.C. § 1125(d)(2)(A) (2012).

<sup>147</sup> See *id.* § 1125(d)(2)(A)(ii)(II).

<sup>148</sup> See *id.* § 1125(d)(2)(C) ("In an *in rem* action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which (i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or (ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.").

<sup>149</sup> See *id.* § 1125(d)(D)(i) ("The remedies in an *in rem* action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.").

statistics on the costs of ACPA litigation are not specifically maintained, AIPLA's 2012 survey of intellectual property law firms does provide average lawsuit cost data for trademark infringement lawsuits. These data provide the best basis for insight into the costs associated with pursuing an ACPA claim through trial. For a trademark infringement lawsuit with less than \$1,000,000 at risk (likely the case for most domain name disputes), the average cost to pursue such a case to completion was \$375,000 in 2012.<sup>150</sup>

Although the UDRP is a significantly cheaper vehicle than an ACPA lawsuit for potentially resolving a dispute over a domain name, neither vehicle is easy to pursue without significant planning and time investment in the adversarial process. With this reality in mind, the following subsection explores those known instances when the news media or other commentators publicized college and university battles for cyberspace, focusing in particular on their uses of the UDRP and the ACPA.

#### *D. College and University Battles for Cyberspace*

Colleges and universities quickly learned that the availability of the restricted .EDU extension did not mean that they were immune from cyberattack by squatters in other TLDs. As two authors writing in 2002 advised, "Institutions should be on guard against a wide variety of domain name registrants, including offshore gambling entities, adult entertainment operators, ticket brokers, entrepreneurs trying to make a quick dollar and even fans and alumni."<sup>151</sup> Indeed, higher education waged battles with all variety of these types of squatters, and news of these efforts soon made its way into the headlines of popular and academic outlets.

In the first reported use of the ACPA by a university, Harvard University sued the operators of the web site <harvardyardsale.com> in December of 1999.<sup>152</sup> The site's operators were using it to offer for sale 65 different domain names incorporating the word "Harvard," such as <harvard-lawschool.com>, <harvardfaculty.com>, and <virtualharvard.com>.<sup>153</sup> Harvard University declined an offer from the site's

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<sup>150</sup> AIPLA, *supra* note 132 at I-161.

<sup>151</sup> Bearby & Siegal, *supra* note 24, at 653-54.

<sup>152</sup> Wendy R. Leibowitz, *Harvard Sues 2 Men Under New Law Aimed at Cybersquatters*, CHRON. HIGHER EDUC. (Dec. 9, 1999), <http://chronicle.com/article/Harvard-Sues-2-Men-Under-New/113762/>.

<sup>153</sup> *Id.*

operators to purchase the domain names, electing instead to sue them in federal court. A spokesman for the university said at the time, “We cannot allow the public to be misled into believing that a site is officially linked to the university when it is not.”<sup>154</sup> The university’s lawyer in the case called universities “latecomers to the world of trademark and domain-name protection.”<sup>155</sup>

The case settled in March of 2000, with the site operators agreeing to transfer the domain names to Harvard.<sup>156</sup> Fresh off this success, the university soon had reason to turn to the ACPA again, when it sued an online course provider operating a web site at <notharvard.com> in August of 2000.<sup>157</sup> The university alleged various Lanham Act claims, including the ACPA violations related to the registration and use of <notharvard.com>, <notharvarduniversity.com>, <notharvardu.com>, and <notnotharvard.com>.<sup>158</sup> After Harvard obtained a preliminary injunction, the case settled on the eve of trial in Harvard’s favor.<sup>159</sup>

Harvard was not alone among elite universities forging paths as fierce protectors of their names and identities online. Stanford and Duke both were cited in 2000 as aggressively pursuing cybersquatters, and the University of North Carolina (UNC) sued the owners of <uncgirls.com>, which featured photographs of naked women on a web site using UNC colors.<sup>160</sup>

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<sup>154</sup> *Id.* For more details about the case, see Alayne E. Manas, Note, *Harvard As a Model in Trademark and Domain Name Protection*, 29 RUTGERS COMPUTER & TECH. L.J. 475, 484-86 (2003).

<sup>155</sup> Wendy R. Leibowitz, As ‘Cybersquatters’ Multiply, Colleges Try to Protect Their Good Names, CHRON. HIGHER EDUC., Jan. 21, 2000, at A39, available at <http://chronicle.com/article/As-Cybersquatters-Multiply/14231/>.

<sup>156</sup> See Andrea L. Foster, *Plan for Domain Suffixes Has Colleges Girding for Trademark Fights*, CHRON. HIGHER EDUC., Aug. 4, 2000, at A41, available at <http://chronicle.com/article/Plan-for-Domain-Suffixes-Has/22238/>.

<sup>157</sup> See Andrea L. Foster, *Facing Lawsuit, NotHarvard.com Changes Name*, CHRON. HIGHER EDUC., Oct. 6, 2000, at A49, available at <http://chronicle.com/article/Facing-Lawsuit-NotHarvardcom/2400/>.

<sup>158</sup> The case filed by Harvard in federal court in Massachusetts came after the site operators preemptively sued Harvard in Texas, seeking a federal court there to declare its use of <notharvard.com> permissible under trademark law. See Manas, *supra* note 154, at 486-96 (discussing the case in detail).

<sup>159</sup> *Id.* at 495; Foster, *supra* note 157.

<sup>160</sup> Jennifer Jacobson, *Sexually Explicit Web Site Sued by U. of North Carolina*, CHRON. HIGHER EDUC. (June 8, 2011), <http://chronicle.com/article/Sexually-Explicit-Web-Site/24618/>; Leibowitz, *supra* note 155; see also Andrew Allemann, *NC State University Loses Domain Name Dispute for Wolfpack.com*, DOMAIN NAME WIRE BLOG (Jan. 31, 2014), <http://domainnamewire.com/2014/01/31/nc-state-wolfpack-domain/> (describing UDRP defeat for North Carolina State University against owner of <wolfpack.com>, who alleged to have registered it for use in connection with a snowshoe project); Glenn Bacal & David Andersen, *Domain Name Dispute Resolution: Proving Bad*



Despite these successful enforcement activities, at least one elite university—and presumably many more non-elite institutions—decided to pursue a more cautious strategy. In 2000, a spokeswoman for Cornell University stated that the institution viewed domain name battles as a hassle, noting that her institution often preferred to coexist rather than fight with similarly-named commercial web sites.<sup>161</sup>

Whatever a given institution's online strategy, what soon became certain was that no college or university could fully protect itself by buying up all domain names that could potentially reference the institution. The permutations of the English language are simply too many, the array of gTLDs and ccTLDs are too great, and the costs of maintaining unused domain names are too expensive, for colleges and universities to justify defensively registering any more than a handful or few dozen domain names. Reed College learned this lesson in 2002, when it discovered someone had registered <reedcollege.com> and was using it to redirect visitors to an anti-abortion web site. Reed College apparently had paid to register <reed.com>, <reed.org>, and other domain names, but not <reedcollege.com>. As the institution's chief technology officer said at the time, "it's impossible to imagine every variation of the name and how it could be used—although in hindsight, [<reedcollege.com>] was an obvious one."<sup>162</sup>

Less obvious may be domain names in obscure or seldom-trafficked extensions, like the ccTLD for the country of Montenegro, .ME. Brandeis University, Babson College, the University of Vermont, and Tufts University all fell prey to the same cybersquatter who registered four domain names in the .ME extension, each confusingly similar to those institutions' names, in order to solicit donations from unsuspecting donors and sell to students purported access to personalized apps.<sup>163</sup>

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*Faith*, BACAL L. GROUP, <http://ipdepartment.net/articles/SunDevils.comUDRPDecision.pdf> (describing UDRP victory for Arizona State University against owner of <sundevils.com>, which the owner used at one time to redirect visitors to a pornographic web site).

<sup>161</sup> Leibowitz, *supra* note 155.

<sup>162</sup> Jeffrey R. Young, *Anti-Abortion Group Uses a Web Address Similar to Reed College's*, CHRON. HIGHER EDUC., Mar. 1, 2002, at A31, available at <http://chronicle.com/article/Anti-Abortion-Group-Uses-a-Web/115980/>. Interestingly, as of June 2014, <reedcollege.com> redirects to Reed College's main .EDU web site, whereas the other two domain names clearly are not affiliated with the institution.

<sup>163</sup> Scott Jaschik, *Victory for Colleges in Cybersquatting Case*, INSIDE HIGHER ED (Aug. 7, 2012, 3:00 AM), <http://www.insidehighered.com/quicktakes/2012/08/07/victory-colleges-cybersquatting-case>; see also *Babson Coll. v. Quevillon*, WIPO Case No. DME2012-0005 (July 23, 2012) (Foster, Arb.), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=DME2012-0005>.

The institutions claimed the activity was a scam, filed a UDRP action, and were awarded transfer of the domain names.<sup>164</sup>

News outlets in higher education continued to highlight the occasional squabble by colleges or universities upset with a third-party's use of space online.<sup>165</sup> Louisiana State University (LSU) even went so far as to sue a current student for his ownership and use of a domain name, <lsulaw.com>.<sup>166</sup> The law student created a web site at the domain out of apparent dissatisfaction with LSU's own web presence and his desire to have an email address that would be easy to remember.<sup>167</sup>

Groups affiliated with higher education also turned to adversarial channels to resolve disputes over domain names. For example, the National Collegiate Athletic Association (NCAA) filed a UDRP complaint against the owner of 32 domain names containing "ncaa" in them (some in conjunction with gambling terms).<sup>168</sup> The NCAA was awarded transfer of all of the domain names except the ones that referenced gambling.<sup>169</sup> The NCAA subsequently challenged those same domain names in an ACPA action in federal court.<sup>170</sup> The NCAA's success with the UDRP continued to be spotty in future actions: an arbitrator awarded the organization transfer of <finalfourmerchandise.com>, but not <finalfourseats.com>.<sup>171</sup>

Also active was the Institute for the International Education of Students, commonly known as the study abroad group IES. IES filed a UDRP complaint against the owner of <iesabroad.com>, which a for-profit competitor had registered and attempted to sell to IES.<sup>172</sup> A panel awarded the domain name to

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<sup>164</sup> Jaschik, *supra* note 163; see also *Babson Coll. v. Quevillon*, WIPO Case No. DME2012-0005.

<sup>165</sup> See, e.g., Brock Read, *Ball State U. Threatens to Sue the Creator of a Web Site Using a Campus Logo*, CHRON. HIGHER EDUC. (Apr. 29, 2002), <http://chronicle.com/article/Ball-State-U-Threatens-to-Sue/115853/> (noting the dispute between Ball State University and owner of domain name <bsupolice.com>, who used the domain to criticize the university).

<sup>166</sup> Katherine S. Mangan, *Louisiana State U. Takes Law Student to Court Over Use of Domain Name*, CHRON. HIGHER EDUC., May 24, 2002, at A33, available at <http://chronicle.com/article/Louisiana-State-U-Takes-Law/115488/>.

<sup>167</sup> *Id.*

<sup>168</sup> See Andrea L. Foster, *NCAA Loses Domain-Name Dispute Involving Sports-Betting Sites*, CHRON. HIGHER EDUC. (Dec. 8, 2000), <http://chronicle.com/article/NCAA-Loses-Domain-Name-Dispute/107176/>.

<sup>169</sup> *Id.*

<sup>170</sup> Bearby & Siegal, *supra* note 24, at 657.

<sup>171</sup> *Id.* at 656-57.

<sup>172</sup> See Andrea L. Foster, *International-Study Group Is Awarded Copycat Domain Name*, CHRON. HIGHER EDUC. (Jan. 5, 2001), <http://chronicle.com/article/International-Study-Group-Is/12895/>.

IES.<sup>173</sup> Foreign universities, too, found the UDRP useful, with the University of Oxford being awarded transfer of <university-of-oxford.com> by a WIPO arbitration panel in 2001.<sup>174</sup>

By the early- to mid-2000s, cybersquatting had emerged as an established, lucrative venture, with many hijacked mark owners—not just colleges and universities—preferring to resolve disputes for their settlement value rather than arbitrating or litigating. Perhaps with that goal in mind, one entity registered a reported 23,000 domain names, each designed to call to mind a college or university, usually by incorporating college or university trademarks in the domain name.<sup>175</sup> The owner of these domain names viewed them as being useful spaces for selling college-related merchandise, but the envisioned use of the domain names never came to fruition, likely because the institutions that were targeted did not condone the business model.<sup>176</sup>

The cybersquatting problem has become so widespread that institutions now commonly receive watch notices from consulting companies that notify them when new uses of their trademarks appear online.<sup>177</sup> Others turn elsewhere for help. For example, institutions that contract with the Collegiate Licensing Company (CLC) to handle the licensing of their trademarks to sportswear companies and others have found an ally in the organization. CLC's general counsel states that each quarter his legal department shuts down hundreds of web sites selling counterfeit college merchandise.<sup>178</sup> These enforcement activities help institutions protect their brand in the often messy world of cyberspace.

Online space continues to be a site of contest for higher education. Of continued concern are authenticity and legitimacy,

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<sup>173</sup> *Id.*

<sup>174</sup> David Cohen, *U. of Oxford Wins Case Against Man Who Used Its Domain Name; Canadian Judge Deems Student Destitute So She Can Sue Father for Support*, CHRON. HIGHER EDUC., Sept. 14, 2001, at A49, available at <http://chronicle.com/article/Oxford-Wins-Domain-Name-Case/107733/>.

<sup>175</sup> Jean Marie Angelo, *Evicting Cybersquatters: Colleges and Universities Have to Protect Their Websites from Those Who Try to Poach Traffic*, UNIV. BUS., Mar., 2007, at 79; Andrea L. Foster, *Company Buys Web Addresses Echoing College Names*, CHRON. HIGHER EDUC. (July 8, 2005), <http://chronicle.com/article/Company-Buys-Web-Addresses/36300/>.

<sup>176</sup> Foster, *supra* note 175; see also Gary T. Brown, *Institutions Interpret Purchase of Domain Names As Illegal*, NAT'L COLL. ATHLETIC ASS'N. (Nov. 21, 2005, 2:25 PM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2005/Association-wide/institutions%2Binterpret%2Bpurchase%2Bof%2Bdomain%2Bnames%2Bas%2Billegal%2B-%2B11-21-05%2Bncaa%2Bnews.html>.

<sup>177</sup> Julia Love, *Colleges' Brands Escape Their Bounds*, CHRON. HIGHER EDUC. (Oct. 1, 2012), <http://chronicle.com/article/Colleges-Brands-Escape-Their/134764/>.

<sup>178</sup> *Id.*

and the fear that consumers of higher education will be confused or misled by a domain name or web site they encounter. Those who wish to profit off of colleges and universities have gone so far as to establish web sites for sham institutions (they copy content from legitimate college web sites),<sup>179</sup> pretend to be the official web site of a university,<sup>180</sup> and exploit campus tragedy.<sup>181</sup>

When ICANN approved the new gTLD extension .XXX in 2011, some colleges and universities took advantage of a pre-purchase window for trademark holders, to make sure that no one could register the institution's name in the extension.<sup>182</sup> Others did not pre-purchase any .XXX domain name, believing that such defensive effort—the cost of which was \$200 per domain name purchased—would be fruitless.<sup>183</sup> The University of Hawaii was one institution that declined to take preemptive action. Leaders there soon became dismayed to find that someone had registered <universityofhawaii.xxx> and was using it to display photos of nude couples engaged in sexual intercourse.<sup>184</sup> After the university sent the registrant a cease-and-desist letter, the matter was resolved.<sup>185</sup>

What has not been resolved is just how broad a presence colleges and universities should seek to stake out in the online

<sup>179</sup> See, e.g., Ben Wieder, *Reed College Seeks to Stop Copycat Web Site*, CHRON. HIGHER EDUC.: WIRED CAMPUS BLOG (Feb. 24, 2011), <http://chronicle.com/blogs/wiredcampus/reed-college-seeks-to-stop-copycat-web-site/29999> (describing how an unaccredited college had created a web site with material copied from Reed College's web site).

<sup>180</sup> See, e.g., Ben Wieder, *Fake Web Site Pretends to Be Youngstown State U.'s*, CHRON. HIGHER EDUC.: WIRED CAMPUS BLOG (Apr. 21, 2011), <http://chronicle.com/blogs/wiredcampus/fake-web-site-pretends-to-be-youngstown-state-u/31048> (describing how someone used <ysu.com> to masquerade as Youngstown State University's official web site).

<sup>181</sup> See Brock Read, *After the Virginia Tech Shootings, Profiteers Rush to Buy Domain Names*, CHRON. HIGHER EDUC.: WIRED CAMPUS BLOG (May 9, 2007), <http://chronicle.com/blogs/wiredcampus/after-the-virginia-tech-shootings-profiteers-rush-to-buy-domain-names/3017> (describing how one man purchased more than 40 domain names intended to call to mind the 2007 campus shootings at Virginia Tech University, including <bloodbathinblacksburg.com> and <virginiatechthemovie.com>).

<sup>182</sup> Jennifer Howard, *QuickWire: Colleges Buy Up .XXX Domain Names to Sidestep Pornographers*, CHRON. HIGHER EDUC.: WIRED CAMPUS BLOG (Nov. 16, 2011), <http://chronicle.com/blogs/wiredcampus/quickwire-colleges-buy-up-xxx-domain-names-to-sidestep-pornographers/34334> (discussing the purchase of <missouri.xxx> and <missouritigers.xxx> by the University of Missouri); Steve Kolowich, *Universities Preempt Pornographers by Buying Up "Dot-XXX" Domains*, INSIDE HIGHER ED (Nov. 30, 2011, 3:00 AM), <http://www.insidehighered.com/news/2011/11/30/universities-preempt-pornographers-buying-dot-xxx-domains> (discussing the purchase of <texasports.xxx>, <hookemhorns.xxx>, and <texasboxoffice.xxx> by the University of Texas, as well as other .XXX domain names preemptively purchased by other colleges and universities).

<sup>183</sup> Kolowich, *supra* note 182.

<sup>184</sup> Steve Kolowich, *'Dot-XXX' Sites May Pose Real Risks to University Brands*, INSIDE HIGHER ED (Feb. 22, 2012, 3:00 AM), <http://www.insidehighered.com/news/2012/02/22/dot-xxx-sites-may-pose-real-risks-university-brands>.

<sup>185</sup> *Id.*

world. As EDUCAUSE's vice president of policy stated in 2012, the opening of each new domain name extension exposes colleges and universities to risks and costs without offering them much value in return.<sup>186</sup> ICANN's latest expansion of the generic top-level domain space—which permits virtually any eligible entity willing to pay a hefty fee and serve as registry to operate its own generic top-level extension—seems to suggest that there is a limit to institutions' willingness to establish their online identities through domain name acquisition. Only three universities in the world, all located in Australia, opted to apply for an extension.<sup>187</sup> In January of 2014, Monash University in Melbourne became the first to receive ICANN approval to operate its extension.<sup>188</sup> According to a press release, the university viewed acquisition of .MONASH as reflective of its presence as a “global institution” and a tool for helping the university develop a new “customer-focused University web presence.”<sup>189</sup>

Meanwhile, in 2012, EDUCAUSE's vice president stated that no American university he was aware of was proceeding to obtain its own gTLD,<sup>190</sup> which ICANN's publicly-available listing of first-round applicants confirms.<sup>191</sup> However, the extensions .COLLEGE and .UNIVERSITY both were approved in April of 2014.<sup>192</sup> Neither is operated by an accredited higher education institution. The marketers behind the .COLLEGE extension see it as innovative space capable of challenging the traditional .EDU extension that they claim “does not allow for the full spectrum of education-based services to establish an

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<sup>186</sup> *Id.*

<sup>187</sup> Carl Straumsheim, *ICAAN's Personalized Domain Names Attracts Little Interest from Higher Education*, INSIDE HIGHER ED (Feb. 3, 2014, 3:00 AM), <http://www.insidehighered.com/news/2014/02/03/icanns-personalized-domain-names-attracts-little-interest-higher-education#sthash.pxTVcz3y.dpbs>. The other two Australian universities that applied were Bond University and La Trobe University.

<sup>188</sup> *Id.*

<sup>189</sup> Press Release, Monash University, Monash First in the World to Acquire a New Brand Top-Level Domain (Jan. 20, 2014), available at <http://monash.edu/news/releases/show/monash-first-in-the-world-to-acquire-a-new-brand-top-level-domain>.

<sup>190</sup> See Kolowich, *supra* note 184.

<sup>191</sup> See *New gTLD Current Application Status*, ICAAN NEW GENERIC TOP-LEVEL DOMAINS, <https://gtldresult.icann.org/application-result/applicationstatus/> (last visited Mar. 6, 2015).

<sup>192</sup> Konstantinos Zournas, *24 More New gTLDs Were Delegated: .college, .engineering, .media, .university, .gop, .yokohama*, ONLINEDOMAIN.COM (Apr. 22, 2012), <http://onlinedomain.com/2014/04/22/news/24-more-new-gtlds-were-delegated-college-engineering-media-university-gop-yokohama/>; see also Casey Fabris, *New .College Domain Is Opportunity for Some Colleges, Worry for Others*, CHRON. HIGHER EDUC. (Mar. 18, 2015), <http://chronicle.com/blogs/wiredcampus/new-college-domain-is-opportunity-for-some-colleges-worry-for-others/56145>.

internet presence.”<sup>193</sup> Which institutions may seek registrations within these two new extensions, and how domain names registered in the extensions will be used, remains to be seen.

## II. A STUDY OF COLLEGE AND UNIVERSITY INVOLVEMENT IN UDRP ACTIONS AND ACPA LITIGATION INVOLVING DOMAIN NAMES

This Part describes the methods I used to compile original datasets consisting of information about college and university involvement in UDRP actions and ACPA litigation over domain names. The section concludes with a description of the study’s limitations.

### A. *Methods*

#### 1. UDRP Research

The UDRP portion of the study proceeded in two stages: (1) data collection concerning UDRP actions, and (2) analysis of individual domain names identified from the collection of data concerning UDRP actions.

The objective of the first phase of the project was to obtain data concerning all UDRP actions filed by American colleges and universities, in order to better understand how they conceptualize their space online. To obtain those data, a structured search of several databases containing information about UDRP actions was conducted. As of the time of data collection in late 2013, ICANN had approved five arbitration providers to conduct UDRP actions.<sup>194</sup> Each of the five current providers maintains a publicly searchable database containing information about UDRP filings made with the arbitration provider. Each of these five databases was searched to identify all UDRP filings by an American college or university. Databases of UDRP providers formerly approved by ICANN were searched as well.<sup>195</sup> Independent searches for the words

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<sup>193</sup> David Eccles, *New Unrestricted Domain Extension .College Approved by ICANN*, SBWIRE BLOG, Aug. 22, 2013, *available at* 2013 WLNR 20912378.

<sup>194</sup> See *supra* note 111 and accompanying text.

<sup>195</sup> Two arbitration providers formerly enjoyed ICANN approval to conduct UDRP proceedings, but by the time of data collection, no longer were approved by ICANN. eResolution was a UDRP arbitration provider from 2000 through 2001, when it quit the business due to disputes with ICANN. See Kieren McCarthy, *eResolution Quits Domain Arbitration: Blames WIPO*, REGISTER (Dec. 4, 2001), [http://www.theregister.co.uk/2001/12/04/eresolution\\_quits\\_domain\\_arbitration/](http://www.theregister.co.uk/2001/12/04/eresolution_quits_domain_arbitration/). It no longer operates. Meanwhile, the International Institute for Conflict Prevention &

*college, university, and regent* in the complainant field were used to identify potentially relevant UDRP actions.<sup>196</sup>

The first three databases searched—the Asian Domain Name Dispute Resolution Centre, the Czech Arbitration Court Arbitration Center for Internet Disputes, and the Arab Center for Domain Name Dispute Resolution—yielded no results. Searches of the databases maintained by WIPO and NAF yielded hundreds of unfiltered results. Records reflecting UDRP actions filed by foreign institutions or non-university business institutions were filtered from the results, yielding 225 responsive records.

The responsive records were examined individually and relevant information was extracted for inclusion in my dataset. Extracted information included the name of the complainant, the respondent, the disputed domain name(s), and the case number; the decision date, outcome,<sup>197</sup> and PDF copy of the panel's decision; and the number of domain names that were the subject of the given UDRP action. Phase one data collection and refinement occurred over several weeks in late 2013.

Phase two of the project entailed further analysis of the domain names involved in the UDRP actions identified in phase one. The domain names were placed in a separate dataset for individual analysis.<sup>198</sup> Each domain name was categorized as falling into one of three researcher-generated categories, based on analysis of its second-level alphanumeric domain name

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Resolution, Inc. (CPR) was an approved UDRP arbitration service from 2000 through 2006; it continues to provide other dispute resolution services. Records of UDRP actions resolved through CPR and eResolution are maintained online at <[www.cpradr.org/FileaCase/CPRsNeutrals/DomainNameICANNDisputes.aspx](http://www.cpradr.org/FileaCase/CPRsNeutrals/DomainNameICANNDisputes.aspx)> and <[www.disputes.org](http://www.disputes.org)>, respectively. While the search functionality of these records is limited, manual review of the records did return one UDRP action that met the study's search criteria. *See Sw. Tex. State Univ. v. Flynn*, CPR 0231 (Jan. 23, 2003) (Weinberg, Arb.) (concerning <[southwesttexasstateuniversity.com](http://southwesttexasstateuniversity.com)>).

<sup>196</sup> For purposes of the study, both four-year and two-year, non-profit and for-profit institutions were included, provided they enroll students in degree programs in the United States.

<sup>197</sup> Possibilities for outcome included "transferred," "cancelled," "claim denied," and "split decision" (i.e., the arbitrator awarded transfer of some, but not all, domain names subject to the UDRP action).

<sup>198</sup> Five domain names—i.e., <[baylorcollegemedicine.com](http://baylorcollegemedicine.com)>, <[baylorjobs.com](http://baylorjobs.com)>, <[baylormedicalcenter.com](http://baylormedicalcenter.com)>, <[baylormedicalschooll.com](http://baylormedicalschooll.com)>, and <[baylorhospitaljobs.com](http://baylorhospitaljobs.com)>—were each the subject of two successful UDRP actions. These domain names only were included once in the second database. One domain name, <[wharton.com](http://wharton.com)>, was the subject of two unsuccessful UDRP actions. *See Wharton Sch. of the Univ. of Penn. v. Motherboards.com*, NAF Claim No. FA0306000161274 (July 24, 2003) (Triana, Arb.), <http://domains.adrforum.com/domains/decisions/161274.htm>; *Trs. of the Univ. of Penn. v. Moniker Privacy Services*, WIPO Case No. D2007-0757 (Oct. 5, 2007) (Townes, Arb.), <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-0757.html>.

string. The mutually-exclusive categories were “name,” “name-plus,” and “other.” Domain names were coded as follows:

- In order to be labeled “name,” the second-level alphanumeric domain name string had to include the college or university name, and no other lettering, although abbreviations of the institution’s name, hyphens, branch campus names, and inclusion of the letters “edu” into the second-level portion of the domain name were permitted.<sup>199</sup>
- In order to be labeled “name-plus,” the second-level alphanumeric domain name string had to otherwise be appropriately categorized as “name,” except for the existence of additional words or terms in the second-level string (e.g., the name of a department, school, or program within the institution, or a service related to the institution).<sup>200</sup>
- Domain names not fitting into either of the aforementioned categories were labeled as “other.” Domain names categorized as “other” have in common that they make no reference to the identity of the college or university complainant.<sup>201</sup>

Additionally, the TLD extensions of the domain names were reviewed to determine which TLDs, and how many of each type, were represented in the dataset.

A web browser was used to visit each of the domain names in the dataset created in phase two. The results of these visits were coded in a separate field in the dataset entitled “visit.” A variety of outcomes resulted from these site visits and were categorized according to the way in which the web page resolved upon visit. The various outcomes were identified as: “fails to resolve,” “parked page,” “forwards with masking,” “forwards without masking,” “functioning web site,” and “other.” Visits were coded as follows:

- Visits to web sites that led to no content being displayed in the web browser, and/or an error message indicating that no server could be found, or no page would resolve, resulted in labeling the domain name “fails to resolve.”<sup>202</sup>
- If upon visit a web site displayed a parked page, the domain name was labeled “parked page.”<sup>203</sup>

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<sup>199</sup> *E.g.*, <johnjaycollege.com>.

<sup>200</sup> *E.g.*, <universityofchicagopress.com>.

<sup>201</sup> *E.g.*, <uhealth.org>.

<sup>202</sup> *E.g.*, <sarahlawrencecollege.com>.

<sup>203</sup> For example, as of this Article’s writing in the Summer of 2014, <universityofidaho.com> was a “parked page,” though it now displays advertising (last visited Mar. 19, 2015). A “parked page” for purposes of this study means a domain name that resolved upon visit to a web page containing advertising listings and links.



- If upon visit a web site redirected to another domain name owned by the institution, without changing the URL displayed in the web browser, the domain name was labeled “forwards with masking.”<sup>204</sup>
- “Forwards without masking” was used for instances where a visit to a given web site redirected the browser to another domain name owned by the institution.<sup>205</sup>
- “Functioning web site” was used to denote functioning, standalone web sites that did not appear to forward to a different institution-controlled site (such as its main .EDU page).<sup>206</sup>
- “Other” was used to denote a visit that resulted in something other than one of the above-described situations.<sup>207</sup>

Additionally, WHOIS searches were conducted for each domain name listed in the dataset created in phase two. Registrars collect certain identifying information from registrants at the time of registration. This information includes the name and physical address of the registrant, as well as the names of and contact information for administrative and technical contacts for the registrant. The veracity of this information is unverified by registrars, and many registrants choose to enter false, misleading, or incomplete information. However, all registrars must make this information searchable through what is called a WHOIS database, located on each registrar’s web site.<sup>208</sup>

The purpose of the WHOIS searches was to determine who currently owns each domain name that was transferred to

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Often these links are targeted to the predicted interests of the visitor, and the domain name registrant (or its registrar) receives payment from the advertisers for each click of a hyperlink that a visitor makes on a parked page.

<sup>204</sup> Few fit this description, but for an example of one, see <baylormedicalhospital.com> (last visited Mar. 19, 2015), which resolves to a page identical to <baylor.edu> (last visited Mar. 19, 2015).

<sup>205</sup> For example, visitors to <sundevils.com> are redirected to <thesundevils.com> (last visited Mar. 19, 2015).

<sup>206</sup> See, e.g., NEW YORK MAKES WORK PAY, <http://www.nymakesworkpay.org> (last visited Mar. 31, 2015); THE UNIVERSITY OF ARIZONA OFFICIAL ATHLETICS WEBSITE, <http://www.arizonawildcats.com> (last visited Mar. 31, 2015).

<sup>207</sup> For example, a visit to <tufts.biz> resulted in a page that displays “(”); dy>“ in the upper left-hand corner of the screen (last visited Mar. 31, 2015). A visit to <bellevuecommunitycollege.com> displayed a site that led one to wonder whether it was the official site for Bellevue College (it is not) (last visited Mar. 31, 2015).

<sup>208</sup> Some registrars’ web sites feature search engines that allow one to search for WHOIS information for domain names registered across registrars. See, e.g., NETWORK SOLUTIONS, <http://www.networksolutions.com/whois/index.jsp> (last visited Feb. 7, 2015). However, sometimes the most accurate information only can be obtained by searching the WHOIS database of the registrar with whom the domain name in question was registered.

a college or university by virtue of a UDRP decision. Categories that emerged from the data include: “institution-owned,” “institution-controlled,” “other entity owns,” “free for registration,” and “privately registered.” Ownership of domain names was coded as follows:

- “Institution-owned” was used when the WHOIS data for a given domain name indicated that the college or university that prevailed in the UDRP concerning the domain name was the domain name’s registrant.
- “Institution-controlled” was used when the WHOIS data for a given domain name referenced in some way the college or university that prevailed in the UDRP concerning the domain name, but the registrant was a different entity that likely controlled the domain name on the college or university’s behalf. For example, WHOIS data might show a law firm as the domain name’s registrant, but list a university-affiliated email address as the administrative contact, indicating beneficial ownership.
- “Other entity owns” was used when an organization or individual not affiliated with or believed to be controlled by the college or university that prevailed in the UDRP action concerning the domain name was identified in WHOIS data as the domain name’s registrant.
- “Free for registration” was used when a WHOIS search revealed that the domain name was available to register or for sale by the registrar.
- “Privately registered” was used when a private registration service appeared in WHOIS data as the registrant, effectively preventing any inference as to the identity of the actual owner of the domain name or its affiliation *vel non* with the college or university that prevailed in the UDRP action concerning the domain name.<sup>209</sup>

## 2. ACPA Litigation Research

The ACPA litigation phase of the project aimed to locate all lawsuits brought by colleges and universities under the ACPA that resulted in a written ruling by a court. Lawsuit

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<sup>209</sup> Private registration is an additional service offered by many registrars at the time of registering a domain name. Private registration effectively means that the registrar lists the name of an entity affiliated with the registrar in the registrant name field. Anyone wishing to reach the beneficial owner of the domain name has to contact the private registration company, using its standard contact information located in the domain name’s WHOIS record. Private registration offers beneficial domain name owners the protection of keeping their identities and contact information out of publicly searchable WHOIS records for a small yearly fee. Private registration also complies with ICANN requirements that registrars collect and maintain registrant information for domain names registered through them.

data were located by running a search and refinement in the databases of reported federal court decisions maintained by Westlaw and Lexis Advance.<sup>210</sup> Returned records were reviewed by hand to verify that they met the inclusion criteria. Results were then reviewed in full for further discussion in Parts III and IV below.

### B. *Limitations*

The study's limitations are minimal. All databases used for data collection are reasonably believed to be accurate, and the search methodologies deployed were sound, although not infallible. First, some colleges and universities—like Massachusetts Institute of Technology—do not contain the words *college*, *university*, or *regent* in their official titles. Therefore, if anything, the findings might be slightly under-inclusive.<sup>211</sup> Second, research into ACPA lawsuits was limited by the fact that the researched databases only contain information about lawsuits that resulted in at least one written opinion; an ACPA lawsuit that a college or university filed, but that did not result in a written opinion (for example, because the case settled), would not be included in the dataset.<sup>212</sup> Additionally, disputes between colleges and universities and others over domain names that did not involve an ACPA claim would not be included in the dataset.<sup>213</sup> Finally, inadvertent errors may have been introduced in the human review process, although reasonable steps were deployed to faithfully execute the research design.<sup>214</sup>

A larger concern is the construct validity of the study. Domain name ownership and use are not static, and much of the data reported in Part III below simply reflects findings at a

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<sup>210</sup> The ALLFEDS database in Westlaw was searched in May 2014 for “anticybersquatting consumer protection act.” Searching these results for the words *college*, *university*, and *regent* returned 72 records. A similar search in Lexis Advance returned 96 records for review.

<sup>211</sup> The additional burden of sifting through the false positives that would have been generated by searching, for example, for *institute* did not justify the undertaking. If all colleges and universities without *college*, *university*, or *regent* in their corporate name were known, they could be searched for specifically to enhance the accuracy of the findings reported here.

<sup>212</sup> PACER is the electronic docketing system maintained by the U.S. federal courts. While searching PACER for all lawsuit filings that meet given criteria is technically feasible, the system has many limitations that make use of it for an empirical study such as this one both cumbersome and costly.

<sup>213</sup> The case involving Ohio State, referenced in *supra* note 110, is the only known case of this sort.

<sup>214</sup> Namely, two coders reviewed all data and verified the coding decision made by the other coder.

given moment in time. A domain name that failed to resolve to a university web page on Tuesday could have been set to forward to the university's main web page on Wednesday. However, this limitation will always exist, given the fluid and changeable nature of the Internet, and provides no compelling reason for discounting any of the reported findings.

### III. FINDINGS

This Part describes the main findings of the original research projects undertaken for this Article.

#### A. *Overview of UDRP Research Findings*

Research into UDRP actions conducted for this Article found that, through the end of the year 2013, 100 different colleges and universities had filed 233 UDRP complaints involving 373 domain names since the UDRP was implemented in 2000. Arbitration panels awarded transfer or cancellation of 91.7% of the disputed domain names ( $n = 342$ ), denying transfer of the remainder ( $n = 31$ ).<sup>215</sup> Quantitative findings are further arrayed below by subheading.

##### 1. Most Active Colleges and Universities

One question of interest concerned the identities of the 100 institutions found to have brought one or more UDRP action: who are these colleges and universities? Table 1 below identifies the most active institutions based on number of UDRP actions filed.

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<sup>215</sup> Of the 342 domain names for which a panel awarded transfer or cancellation, 337 of them were distinct. *See infra* Part III.A.5.

**TABLE 1**  
**UDRP Activity by No. of UDRP Actions Filed**

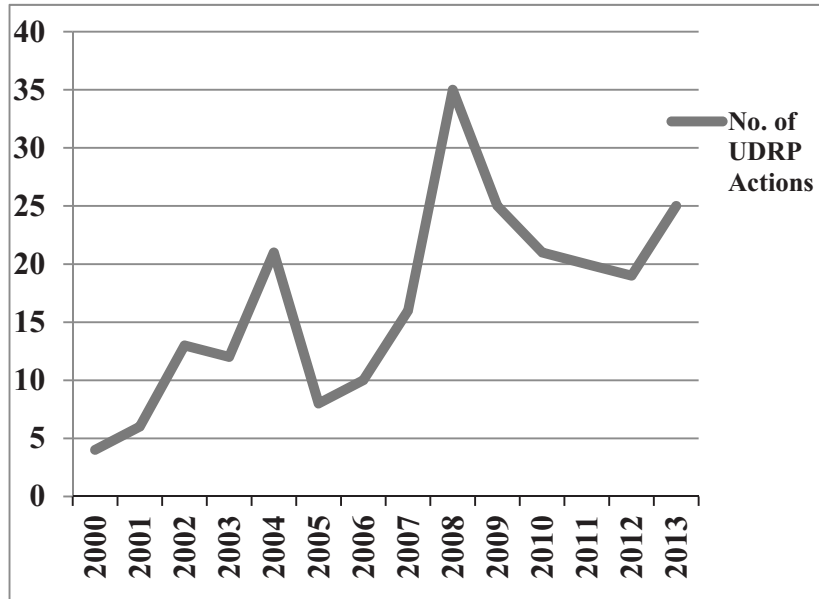
Institution Name	No. of UDRP Actions
Baylor University	62
University of Texas System	19
Harvard University	7
American University	6
Bob Jones University	6
University of Michigan	5
West Coast University	5
Tufts University	4
Yale University	4
Grand Valley State University	3
Southern California University	3
University of Utah	3
Stanford University	3

As noted, only a few institutions of those that have filed a UDRP action have filed three or more UDRP actions. Eighty-seven institutions (or 87.0% of all that filed UDRPs) have filed only one or two UDRP actions, compared to the 13 institutions identified in Table 1.

## 2. UDRP Actions by Year

The dataset also allowed for analysis of the number of UDRP actions filed by colleges and universities by year. The year 2008 witnessed the most filings, with 35. Unsurprisingly, the year 2000—the year the UDRP was implemented—saw the fewest UDRP filings by colleges and universities, with only four. Graph 1 depicts the activity, noting a general increase over time, but a tapering off in recent years.

**GRAPH 1**  
**UDRP Actions Filed by Colleges and Universities per Year**



### 3. Domain Names by Type

As described in Part II, the 373 domain names identified as being subject to UDRP actions brought by colleges and universities were categorized by type (name, name-plus, and other) as well as by TLD extension type (.COM, .ORG, etc.). Table 2 displays the different types of domain names that were subject to UDRP actions. As indicated, most ( $n = 204$ , or 54.7%) of the located domain names were “name-plus” domain names.

**TABLE 2**  
**Types of Domain Names Subject to UDRP Actions**

Type of Domain Name	No. of Domain Names ( $n = 373$ )
Name	140 (37.5%)
Name-plus	204 (54.7%)
Other	29 (7.8%)

Table 3 identifies the variety of TLD extensions of the domain names that were subject to UDRP actions brought by colleges and universities. As noted, approximately 75% of all disputed domain names ( $n = 283$ , or 75.9%) ended in .COM. Thirteen different types of TLDs were represented in the data.

**TABLE 3**  
**TLD Extensions at Issue in the UDRP Actions**

<b>TLD Extension</b>	<b>No. of Domain Names (<i>n</i> = 373)</b>
.COM	283 (75.9%)
.ORG	31 (8.3%)
.NET	21 (5.6%)
.US	9 (2.4%)
.INFO	8 (2.1%)
.MOBI	7 (1.9%)
.ME	4 (1.1%)
.BIZ	4 (1.1%)
.XXX	2 (0.5%)
.TV	1 (0.3%)
.NAME	1 (0.3%)
.CO	1 (0.3%)
.PA	1 (0.3%)

#### 4. Baylor University Domain Names

Baylor University is in many ways an outlier with respect to UDRP activity by colleges and universities. As noted in Table 1, data revealed that Baylor had filed 62 UDRP actions involving 130 domain names. Appendix A contains a table that identifies those 130 domain names.

#### 5. WHOIS Data

Of the 337 distinct domain names for which colleges and universities had achieved transfer or cancellation by virtue of a UDRP decision, I wanted to know who currently owned those domain names.<sup>216</sup> Accordingly, in spring of 2014, WHOIS searches were conducted for each of these domain names. A quarter of the domain names (*n* = 84, or 24.9%) were available to register, and approximately another 7% (*n* = 23) were registered to an entity clearly not affiliated with the college or university that had prevailed in the UDRP action concerning the domain name. Another 26 domain names (7.7%) were privately registered, and 204 (60.5%) were owned or controlled by the institution. Table 4 depicts these findings.

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<sup>216</sup> Five domain names were the subject of two successful UDRP actions. See *supra* note 198. These five domain names only were analyzed once for purposes of the findings reported in Part III.A.5 and Part III.A.6, *infra*.

**TABLE 4**  
**Ownership of Domain Names Cancelled or Transferred**  
**to Colleges & Universities in UDRP Actions**

WHOIS Information	No. of Domain Names ( <i>n</i> = 337)
Available to register	84 (24.9%)
Other entity owns	23 (6.8%)
Privately registered	26 (7.7%)
Institution-owned	141 (41.8%)
Institution-controlled	63 (18.7%)

## 6. Site Visit Data

I sought to know how the domain names transferred to the college or university that brought the UDRP were currently being used. Accordingly, each of the 227 domain names that was transferred and not clearly owned by another entity or available to register was visited and its contents surveyed pursuant to the methodology described in Part II.<sup>217</sup>

As depicted in Table 5, the plurality of the domain names (*n* = 98, or 43.2%) failed to resolve to a web page upon visit. Combined with the 31 domain names (13.7%) that resolved to a parked page, results show that nearly 60% of the domain names (*n* = 129, or 56.8%) effectively were not being used at all. Two domain names (0.9%) forwarded with masking, 78 (34.4%) forwarded without masking, and 7 (3.1%) displayed their own functioning web site. Another 11 domain names (4.8%) were labeled as “other” for reasons such as the following: the site requested a login and password in order to resolve,<sup>218</sup> the site displayed a blank page,<sup>219</sup> or the site displayed meaningless text.<sup>220</sup>

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<sup>217</sup> Six domain names—i.e., <lobobasketball.com>, <lobofootball.com>, <nittanylions.org>, <pennstatebookstore.com>, <pennstatestore.com>, and <wearepennstate.com>—were cancelled as opposed to transferred to the complainant. These domain names are not represented in Table 5, nor is any domain name that was coded as available to register or registered to another entity.

<sup>218</sup> See <mybaylor.com> (last visited Feb. 8, 2015).

<sup>219</sup> See <baylordental.com> (last visited Feb. 8, 2015); <harvarduniversitypress.com> (last visited Feb. 8, 2015).

<sup>220</sup> See, for example, <tufts.biz> (last visited Mar. 15, 2015).



**TABLE 5**  
**Use of Institution-Owned or -Controlled, or Privately**  
**Registered, Domain Names Upon Visit**

Use	No. of Domain Names ( <i>n</i> = 227)
Failed to resolve	98 (43.2%)
Parked page	31 (13.7%)
Forwards with masking	2 (0.9%)
Forwards without masking	78 (34.4%)
Functioning web site	7 (3.1%)
Other	11 (4.8%)

*B. Overview of ACPA Litigation Research Findings*

Research into judicial opinions where a court had been asked to decide an ACPA claim brought by a college or university returned very few cases. Indeed, research located only two district court cases and no appellate decisions.<sup>221</sup>

The first case was brought by Baylor University against a company and an individual who had registered <baylorbears.com>.<sup>222</sup> Shortly after registering the offending domain name, the defendants posted a web page at the domain that targeted Baylor University students and alumni.<sup>223</sup> Baylor sued the defendants for trademark infringement, dilution, unfair competition, and for violating the ACPA. After default was entered against the corporate defendant, the university moved for summary judgment on all claims against the personal defendant, who was a Baylor alumnus.<sup>224</sup> The court granted summary judgment to the university on all claims and awarded it attorneys' fees.<sup>225</sup>

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<sup>221</sup> Two additional cases were located involving medical schools with domestic offices but with primary operations located abroad. *See* Ross Univ. Sch. of Med. v. Amini, Civ. No. 13-6121, 2014 WL 29032 (D. N.J. Jan. 2, 2014) (involving ACPA claim related to the domain names <rossu.net>, <rossmedicalschoool.org>, and <rossmedicalschoool.com>, among others); Am. Univ. Ant. Coll. of Med. v. Woodward, 837 F. Supp. 2d 686 (E.D. Mich. 2011) (holding on plaintiff's motion for summary judgment that defendant's registration and noncommercial use of <aua-med.com> was not actionable under the ACPA because it constituted protected cyber-gripping). These were not further analyzed as they did not involve an American college or university. While Harvard University was involved in two ACPA cases initiated in 1999 and 2000, *see supra* text accompanying notes 152-59, these cases resolved without any written judicial opinion and thus were not located in the study described in Part II, *supra*.

<sup>222</sup> *See* Baylor Univ. v. Int'l Star, Inc., No. W-00-CA-231, 2001 WL 1796464 (W.D. Tex. Nov. 7, 2001).

<sup>223</sup> *Id.* at \*1.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at \*3-4.

The second located case concerned Savannah College of Art and Design (SCAD).<sup>226</sup> This case involved a defendant who had registered two domain names (<scad.info> and <scad-and-us.info>) incorporating the college's trademarks. The defendant used the domain names to display web sites airing negative commentary—penned by himself and others—about SCAD, which formerly employed him and his wife until she was fired and he resigned.<sup>227</sup> SCAD filed suit under the ACPA and other provisions of the Lanham Act, alleging trademark infringement; however, on the first day of trial, SCAD moved to dismiss its ACPA claim, and the court granted the motion.<sup>228</sup>

After a trial on SCAD's Lanham Act claims, the court ruled in favor of the defendant, finding that he had not made a commercial use of SCAD's marks, and that even if he had, such use did not pose a likelihood of confusion.<sup>229</sup> In its analysis of SCAD's trademark infringement claim, the court reviewed the similarity between SCAD's marks and the defendant's web site and domain names. Of interest is the court's following observation:

Is it conceivable that an Internet user searching for information on Savannah College may initially type the URL scad.info in the address box? Of course. Is it likely? No. The .edu domain is universally used by schools of higher education while the .info domain is relatively new. Thus, a user who is inclined to start his or her search with a URL is more likely to input scad.edu rather than scad.info.<sup>230</sup>

The court's language substantiates the importance of the .EDU extension in the public's eye, while downplaying the likelihood that visitors to non-.EDU domain names will be confused into regarding them as replacements for .EDU domain names.

More details about SCAD's ACPA case are discussed in Part IV.A below.

#### IV. EXPANDING DOMAINS: POLICY CONCERNS RELATED TO HIGHER EDUCATION'S CONTENTIOUS DOMAIN NAME ACQUISITION EFFORTS

In light of findings from the original study conducted for this Article, this Part discusses various policy concerns related to contentious efforts by colleges and universities to expand

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<sup>226</sup> See Savannah Coll. of Art & Design, Inc. v. Houeix, 369 F. Supp. 2d 929 (S.D. Ohio 2004).

<sup>227</sup> *Id.* at 935-38.

<sup>228</sup> *Id.* at 931 n.1.

<sup>229</sup> *Id.* at 957.

<sup>230</sup> *Id.* at 952 (footnote omitted).

their domain name holdings through the UDRP and ACPA litigation. In particular, this Part considers difficulties confronting institutions as they seek to build and protect their brands online while also being sensitive to the academic value of open discourse and the potential reputational harms that face institutions that engage in enforcement activity. This section also considers what insights may be drawn from the study concerning college and university approaches to fighting cyberbattles. I conclude with a discussion of what the future may hold for college and university battles for cyberspace, offering a suggested set of questions that college and university decision makers should consider before pursuing contentious acquisition of domain names.

A. *Freedom of Expression and Reputational Concerns*

Because Internet domain names are rivalrous, registrations for online space raise the specter of conferring a virtual linguistic monopoly on their holders.<sup>231</sup> Linguistic monopolies can be dangerous because they risk constraining the freedom of language in the virtual commons, a restriction that can alter public consciousness and memory in lasting ways.<sup>232</sup> Take for example the domain name <history.org>. One might expect a visit to that domain name to lead to information about world history, or provide resources to teachers and students who wish to understand various details about world wars or other momentous events. Instead, the domain name resolves to a web site that provides information about a very particular (albeit important) slice of history, the American Revolutionary War.<sup>233</sup> The Colonial Williamsburg Foundation's registration for this domain name means that anyone in the world who wishes to use the generic word *history* to drive traffic to a domain name about history must find a different extension in which to do so, or rely entirely on search engine optimization strategies to drive traffic to domain names other than <history.org>. If one considers the normative question of who should own domain names like <jesus.com>, or <holocaust.com>, or whether they should even be available to

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<sup>231</sup> LIPTON, *supra* note 12, at 92-93.

<sup>232</sup> *Id.*

<sup>233</sup> See COLONIAL WILLIAMSBURG: THAT THE FUTURE MAY LEARN FROM THE PAST, <http://www.history.org> (last visited Feb. 8, 2015) (domain name owned by the Colonial Williamsburg Foundation).

register at all, one immediately senses how Internet policy quickly intersects with social policy.

The symbolic force and social resonance of domain names in the .EDU extension are similar. <wm.edu> simply is a better domain name than <williamandmary.edu> because it is shorter and more incisive; fortunately for the College of William & Mary, it applied for <wm.edu> before William Mitchell College of Law sought its domain name (<wmitchell.edu>). Similar to other registries, EDUCAUSE follows a first-come-first-served policy with respect to registering domain names in the .EDU extension.

While not their primary purpose, domain names undeniably serve brand functions in higher education. For example, many at the University of Mississippi would prefer to see their institution use a more neutral-sounding, descriptive domain name, like <umiss.edu>, instead of <olemiss.edu>, which to some conjures mental associations with slavery and segregation.<sup>234</sup> In short, a simple domain name often conveys impressions to people as much as it identifies computers to users, and thus college and university battles for cyberspace also should be viewed through a critical cultural lens, as these efforts to define online space can bear on institutional image and reputation in important and lasting ways.

Some of the battles identified in the research conducted for this Article raise the issue of institutional commitment to free expression, a quintessential academic value, as well as the consequences to an institution's reputation that can come from battles for cyberspace.<sup>235</sup> Since at least the nineteenth century, American colleges and universities have been regarded as metaphysical marketplaces of ideas, areas where no subject is off limits provided study or discussion of it might lead to better understanding of the world.<sup>236</sup> This quality, to many inherent in the very concept of higher education itself, may lead one to question what happens, or should happen, when an institution's

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<sup>234</sup> See Scott Jashik, *Names, Symbols and Race*, INSIDE HIGHER ED (Aug. 4, 2014), <http://www.insidehighered.com/news/2014/08/04/u-mississippi-tries-new-approach-its-history-race-and-faces-criticism>.

<sup>235</sup> Accord MUELLER, *supra* note 18, at 231 (“[M]easures to control [cybersquatting] are expanding property rights to names at the expense of free expression, privacy, and competition.”).

<sup>236</sup> See generally ROBERT M. O'NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER, AND THE UNIVERSITY* (2008). Of course, this commitment to free inquiry does have limitations. Some modes of speech, such as plagiarism and other forms of cheating, are not tolerated in higher education, even though they may not be illegal or universally deemed immoral in any popular sense.

interest in a domain name conflicts with the speech interests of a third party.

For purposes of my study, this hypothetical concern came to resolution in those few instances when institutions used the UDRP or the ACPA as a vehicle for capturing a domain name reflecting, or capable of reflecting, speech with which the institution may take issue or disagree, even if the university was within its trademark rights to do so. Illustrative UDRP actions from my study meeting this description include disputes over ownership of <tuftsgeek.com>, <harvardgirls.school.com>, <ihatebaylor.com>, <baylorsucks.com>, and <baylorbearssuck.com>.<sup>237</sup> Each of these domain names, by virtue of its alphanumeric strings standing alone, calls to mind speech that is potentially unsavory or critical of the institution whose trademarked name is contained in the domain name. Several critical questions arise from these isolated incidents. Should Baylor seek to grab <ihatebaylor.com> from someone else, simply because the domain name's alphanumeric string standing alone is critical of the institution? To what extent should the use to which a given domain name is being put inform decision making about enforcement? If domain names containing critical word strings are used to display negative speech about an institution, should the affected institution always seek transfer of them?

Examination of the facts behind each UDRP complaint corresponding to the five domain names referenced above reveals complicated stories, only two of which seem to present—from a policy standpoint—compelling cases for enforcement action. In all of these cases, however, one notes the sensitivity and fact-specific nature of the undertaking when a college or university seeks to claim from another a domain name reflecting a message critical of, or unsavory to, the institution.

The UDRP action involving <tuftsgeek.com> represents an instance of justified enforcement activity, even though the domain name standing alone appears to be a potential vehicle for speech critical of the university. However, when Tufts University filed a UDRP action against the registrant of <tuftsgeek.com>, the domain name was being used “to redirect Internet users to Respondent’s website that commercially offers advice services for an hourly rate.”<sup>238</sup> That is to say, instead of being used to criticize the institution, the domain name

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<sup>237</sup> See *infra* notes 238 and 240-42 for citations to these decisions.

<sup>238</sup> Tufts Univ. v. Stevan Obradovic, NAF Claim No. FA0701000881136, at 2 (Feb. 19, 2007) (Yachnin, Arb.), <http://domains.adrforum.com/domains/decisions/881136.htm>.

displayed speech of a commercial character that had a potential to confuse consumers. At no point did the record suggest that the domain name was used to criticize Tufts or the study habits of its students, although one could imagine its potential utility for such purpose. Because the domain name's registrant essentially was usurping the value of the Tufts trademark for its own purposes, the arbitration panel rightfully found bad faith and transferred the domain name to the university.<sup>239</sup>

A similar story abides for <harvardgirls.school.com>, which displayed "pornographic pictures and videos, causing rotating banners to appear and generating hyperlinks to other pornographic websites of the same caliber" when Harvard University filed a UDRP action against its owner in 2005.<sup>240</sup> No doubt the use of the Harvard name in connection with such base speech, unrelated to any comment or criticism of the university, does nothing to further a compelling societal interest. However, just as with <tuftsgeek.com>, one easily can imagine a different set of facts where a hypothetical registrant of <harvardgirls.school.com> used the domain name to engage in speech critical of the institution. Would the institution have sought transfer of the domain name had it been used for non-pornographic speech of a critical nature, or no speech at all?

Baylor University's decision to pursue transfer of <ihatebaylor.com>, <baylorsucks.com>, and <baylorbearssuck.com> via UDRP actions provides examples of an institution inappropriately acting in the face of such circumstances. Baylor University filed UDRP actions against the registrants of <ihatebaylor.com> and <baylorsucks.com> in 2008 and 2012, respectively.<sup>241</sup> Both sites resolved to parked pages at the time the UDRP actions were filed, meaning that they effectively were not being used in any fashion that might lead site visitors to be confused as to the university's affiliation or endorsement of the sites (e.g., to advertise a person's own goods or services), or to think poorly of Baylor for reasons unrelated to any criticism of the institution (e.g., to display pornography). They also contained no speech actually critical of the university,

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<sup>239</sup> *Id.*

<sup>240</sup> President & Fellows of Harvard Coll. v. Nikolay, WIPO Case No. D2005-0120, at 2 (May 16, 2005) (Carey, Arb.), <http://www.wipo.int/amc/en/domains/decisions/html/2005/d2005-0120.html>.

<sup>241</sup> See Baylor University v. Andrew Makarov, NAF Claim No. FA1204001438498 (May 16, 2012) (Meyerson, Arb.), <http://domains.adrforum.com/domains/decisions/1438498.htm>; Baylor Univ. v. Sysadmin Admin., NAF Claim No. FA0802001153718 (Apr. 11, 2008) (Stoner, Arb.), <http://domains.adrforum.com/domains/decisions/1153718.htm>.

although their alphanumeric strings alone reflect their utility as vehicles for direct criticism. By seeking transfer of these domain names, Baylor effectively sought to control two forums for criticism of the institution, all within the legal trappings of protecting its trademarks.

Not only is such a motivation misguided—no university could ever control all possible online forums that could be used to criticize the institution—but, in my opinion, such efforts can prove perilous for the university's image and reputation, as the disposition of <baylorbearssuck.com> helps illustrate. In the UDRP action concerning that domain name, the respondent claimed that he acquired the domain name (along with four others: <baylorbears.biz>, <baylorbears.name>, <baylorbears.net>, and <baylorbears.tv>) “with the intention of creating a social networking website akin to MySpace for Baylor University students and alumni. However, due to lack of funds, the website was never developed.”<sup>242</sup>

Shortly after Baylor filed the UDRP, the respondent set the disputed family of domain names to redirect visitors to the web site for Texas A&M University, one of Baylor's chief rivals. While the respondent indicated he took this action as a joke, the panel was not amused and found the act to be further evidence of bad faith, writing that the respondent was “contemptuous” of the UDRP proceedings and viewed the panel merely as “an opportunity to harass Baylor University for his own amusement.”<sup>243</sup>

The respondent further attempted to persuade the panel that using the <baylorbearssuck.com> domain name in a manner critical of Baylor University should be considered protected noncommercial speech. However, the panel reasoned that “there is no indication that in this case the domain name is being used or at any time was being used for such a purpose.”<sup>244</sup> The panel overlooked the argument that causing a domain name such as <baylorbearssuck.com> to redirect to the web site of a competitor institution could itself be viewed as an act of criticism, or at least parody, and that some may view such act as speech that deserves protection. Regardless, the point remains that institutions committed to the free exchange of ideas should

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<sup>242</sup> Baylor University v. JS, NAF Claim No. FA0801001141911 (Mar. 14, 2008) (Grossman, Arb.), <http://domains.adrforum.com/domains/decisions/1141911.htm>.

<sup>243</sup> *Id.* at 3, 5.

<sup>244</sup> *Id.* at 4.

not be so quick to seek to claim ownership of a venue in which speech critical of the institution might be displayed.

In addition to serving as a cautionary tale for institutions considering action over other domain names similar in expressive character to <baylorbearssuck.com>, the UDRP dispute involving that domain name also stands as a vivid example of the potential reputational consequences of college and university battles for cyberspace. While Baylor University won that particular UDRP battle, one must question whether in doing so it provoked an unnecessary and damaging war. The respondent in the UDRP action was an alumnus of the university named John Stipe. Mr. Stipe felt aggrieved when his alma mater filed the UDRP, having only communicated with him once about the domain name, through a lawyer's cease-and-desist letter.<sup>245</sup> As he put it:

It went straight to the lawyers and it was entirely legal. They didn't offer to help me or to buy the domain names or anything . . . Lawyers are not cheap, so why do you pay a lawyer to present documents and file papers on someone? . . . Their response was over 100 pages.<sup>246</sup>

Thirteen days after losing the UDRP action, Mr. Stipe purchased five additional domain names incorporating "sucks" and "Baylor" in various extensions, stating in text displayed to visitors of those domain names that "I purchased these domain names to expose the tactics Baylor University used in order to take the [other] domain names from me."<sup>247</sup> As he told me, "I played by the rules. I lost the case, and they said the web sites were not used as a free speech thing, so I said 'Fine, I'll show you,' and I made it free speech."<sup>248</sup>

On the main web page displayed at the domain names he purchased after losing the UDRP, Mr. Stipe went on to allege that Baylor, in an effort to prevent criticism of the university, owns at least seven other domain names that were not subject to the UDRP it filed against him, each of which contains "sucks" and "Baylor" in some configuration.<sup>249</sup> In addition to questioning the propriety of the university's ownership of the other domain names, and conjecturing about

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<sup>245</sup> See John Stipe, *The Bear Truth*, BAYLOR BEARS SUCK, <http://www.baylorbearssuck.us> (last visited Mar. 6, 2015). As this Article went to press in June of 2015, <baylorbearssuck.us> no longer resolved to a web page.

<sup>246</sup> Telephone interview with John Stipe (June 17, 2014) (transcription on file with author).

<sup>247</sup> See Stipe, *supra* note 245.

<sup>248</sup> Telephone interview with John Stipe, *supra* note 246.

<sup>249</sup> See Stipe, *supra* note 245.



the amount of legal fees Baylor University must have expended in the UDRP action it brought against him, Mr. Stipe described what he viewed as the unfairness of the university's domain name enforcement strategy:

I question why Baylor University chose to take my websites from me, but allow others to have theirs. BaylorBears.org was registered on Jan 29, 2001 and is owned by a person in New York. BaylorBears.mobi was registered on Oct 7, 2006 and is owned by a person in South Carolina. And while Baylor University was fighting me for my names, on Feb 29, 2008, a person in Germany purchased BaylorBears.info. Or how about SicEmBears.org that was registered on Jul 25, 2007 to someone in California? . . .

I would also like to point out, which goes unanswered by Baylor University officials, why is BaylorFans.com allowed to exist for the last 9 years? Baylor owns BaylorFans.org, but does NOT own BaylorFans.com or BaylorFans.net. Further, Baylor does not own InsideBaylorSports.com which has existed since 2003, but Baylor owns BaylorSports.com and BaylorSports.net.

It is interesting that the Baylor lawyers were arguing trademark violations in order to take my names from me when it is quite obvious they pick and choose who they want to go after. It is going to be interesting to see what Baylor University does with the names they took from me without compensation. We already know what Baylor University will do with the BaylorBearsSuck.com, but the truth can be told in BaylorBearsSuck.net, BaylorBearsSuck.org, BaylorBearsSuck.us, BaylorBearsSuck.info, and BaylorBearsSuck.biz.<sup>250</sup>

What is perhaps most intriguing about this saga is that, as of June 2014, more than six years after the UDRP awarding Baylor University ownership of <baylorbearssuck.com>, the university still owned the domain name, yet used it to display the same critical commentary quoted above that otherwise appeared on the domain names owned by Mr. Stipe.<sup>251</sup> I asked Mr. Stipe if he knew why this was. "I think that's probably just a mistake on their part," he said.<sup>252</sup>

Mr. Stipe's dispute with Baylor University is telling for many reasons. From a reputational standpoint, the university must question whether its enforcement effort against an

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<sup>250</sup> *Id.*

<sup>251</sup> As of Spring 2015, of the five domain names subject to the UDRP, four (i.e., <baylorbearssuck.com>, <baylorbears.net>, <baylorbears.tv>, and <baylorbears.name>) failed to resolve, and the additional one (<baylorbears.biz>) redirected to a domain name controlled by Mr. Stipe.

<sup>252</sup> Telephone interview with John Stipe, *supra* note 246, at 2. Mr. Stipe likely was correct. In the five months from when a draft of this Article initially appeared online until when it was published, Baylor caused <baylorbearssuck.com> to stop displaying any content at all.

alumnus was worth the counter-speech it incited.<sup>253</sup> More than six years after the UDRP was decided, Mr. Stipe's critical domain names still existed and still were being used to display speech critical of Baylor, potentially raising attention disproportionate to the concern that motivated university action in the first instance.<sup>254</sup> To be sure, time heals some wounds, but not all. Mr. Stipe told me that he probably will continue to renew the registrations for the domain names he registered after losing the <baylorbearssuck.com> UDRP, even though he no longer cares about the issue all that much.<sup>255</sup>

The university's dispute with Mr. Stipe also reasonably calls into question what institutions like Baylor hope to gain through a Whac-a-Mole-type approach to domain name enforcement. As displayed in Table A-1 in Appendix A, the array of domain names that Baylor has sought through UDRP actions is staggering, both in number and variety.<sup>256</sup> Baylor no longer owns many of these domain names, even though the university prevailed in UDRP actions that awarded their transfer to Baylor, and many effectively are not being used at all (i.e., they do not resolve to an active page upon visit).

While defenders of Baylor's enforcement efforts might point to Table A-1 as evidence of the university's strong position with respect to protecting its intellectual property, detractors might view these efforts as silly, wasteful, and unnecessarily chilling of potentially legitimate third-party speech.<sup>257</sup> Assuming enforcement is a value prized by the institution, one must question to what extent the intangible loss of goodwill among alumni is worth the price. As Mr. Stipe reflected to me,

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<sup>253</sup> This question is more rhetorical than actual. Baylor University recently sued the Baylor Alumni Association, seeking to stop it from using the Baylor name and trademarks after the formal relationship between the two broke down. *Baylor U. Sues to Stop Alumni Group From Using Its Marks*, INSIDE HIGHER ED (June 11, 2014), <http://www.insidehighered.com/quicktakes/2014/06/11/baylor-u-sues-stop-alumni-group-using-its-marks>. This lawsuit, and the UDRP action against Mr. Stipe, suggest that the possibility of making headlines for suing its alumni may not be much of a deterring factor for the university as it considers trademark enforcement options.

<sup>254</sup> The dispute did make local headlines as it unfolded in 2008. See Travis Measley, *Revenge.com: Baylor Files Lawsuit Over Trademark Abuse in Websites Using Name, Mascot*, BATALION ONLINE (Feb. 27, 2008).

<sup>255</sup> Telephone interview with John Stipe, *supra* note 246.

<sup>256</sup> See *infra* Appendix A.

<sup>257</sup> Knowledge of these past efforts in the collective also might provide a handy roadmap for anyone looking to cause Baylor to incur more legal fees: simply register a domain name incorporating the university's name, then wait for the UDRP action to be filed.

I just felt that Baylor has all this money and power and they do whatever they want to do. That's the way I see it. [ . . . ] The main thing that I find that works in things like this in life is just be nice to people and talk to them. It was really not necessary to throw around the lawyers, get the lawyers involved in something like this. The money you spent on the lawyers, why not pay someone a reasonable amount for the domain name? It doesn't have to be thousands of dollars, it could be a couple hundred of dollars or something. Or free tickets to the football game.<sup>258</sup>

Of course, lawyers for colleges and universities would bristle at Mr. Stipe's reasoning, and rightfully so. If word spread that Baylor provided football tickets to those who arbitration panels are likely to view as cybersquatters, there soon would not be enough seats in Floyd Casey Stadium to accommodate all of those looking to strike a deal. Some institutions would rather pay thousands of dollars to their attorneys than pay one dollar to someone they view as using opportunistic or potentially coercive tactics.

But in Mr. Stipe's case, should his alumni status not have resulted in better treatment? Perhaps at least a phone call attempting to persuade him of the legal merits of the university's position? Likely some attempt at reaching an amicable settlement, before the university commenced the legal processes, would have allowed the institution to protect its reputation while also protecting its trademarks. At the very least, <baylorbearssuck.com> could have been carved out of the UDRP filing involving the other four domain names, so as to avoid the question whether intellectual property protection was more important to the university than not being seen as an overzealous monitor of any market reference to the institution that might have a critical edge.

SCAD's ultimately unsuccessful ACPA lawsuit against one of its former professors provides a similar cautionary tale regarding the perils of enforcement, particularly when the targeted domain name resoundingly implicates expressive interests.<sup>259</sup> The case is instructive even though the university failed to take its ACPA claim to trial.<sup>260</sup> The speech at issue on the disputed domain names was directly critical of SCAD at various levels, including its hiring practices, treatment of

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<sup>258</sup> Telephone interview with John Stipe, *supra* note 246.

<sup>259</sup> Savannah Coll. of Art & Design, Inc. v. Houeix, 369 F. Supp. 2d 929, 957 (S.D. Ohio 2004).

<sup>260</sup> The reasons for this determination are not readily apparent from the only written decision in the case. *Id.*

students and employees, and academic policies.<sup>261</sup> The purpose of the defendant's web site, according to the court's assessment of the defendant's testimony in the case, was

to provide news and information to prospective students, parents and faculty members about Savannah College that they will not get from the College . . . to not only provide a site for [defendant's] "story" but to provide a site for others to report their experiences with the school . . . [including] information to foreign students on accreditation and other matters of concern, and to publicize little discussed problems such as crime on campus.<sup>262</sup>

The defendant posted approximately 200 emails from community members who had written him on the primary disputed domain name, sharing their criticism of SCAD.<sup>263</sup> Some of these communications were so harmful to SCAD that prospective students and faculty members decided not to join the institution because of them.<sup>264</sup> However, SCAD did not allege that any of the matter was defamatory, regardless of how unpleasant and damaging to its image the institution found the web site's contents. Allegedly not intending to confuse anyone as to the institution's sponsorship or affiliation with his critical web site, the defendant registered the disputed domain names, and used SCAD on the web site, not in reference to the institution, but as the acronym for "Share, Communicate, Announce, Disclose."<sup>265</sup>

The court ultimately agreed with the defendant that his expressive activities on the disputed domain name did not violate SCAD's trademark interests. Even though the speech was hurtful to SCAD, non-defamatory speech of a critical and hurtful nature is not *per se* tantamount to speech that confuses consumers.

Encouraging is the fact that no ACPA lawsuits involving universities in scenarios such as the one presented in the SCAD case have surfaced since 2004. And while a handful of non-representative UDRP actions located in my study raise the prospect of how institutions deal with online criticism, the majority of UDRP disputes identified in the study provide no reason for concern on this point.

Those few, isolated cases described in this subsection, however, are instructive of the potential hazards that lurk for institutions considering contentious acquisition of domain

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<sup>261</sup> *Id.* at 937.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 938.

<sup>264</sup> *Id.* at 939.

<sup>265</sup> *Id.* at 936.

names, particularly ones of a predominantly expressive character. The quintessential academic value of free expression risks being sidelined when a college or university's response to non-confusing online criticism of it—including in an alphanumeric domain name string otherwise not being used to display content—is to turn to trademark law and cyber-dispute resolution mechanisms to attempt to capture the offending domain name. Using the UDRP or the ACPA to attempt to wrest control of a domain name from a critic—perhaps with the thought that the costs of involvement in the dispute will drive the defendant to settle—contradicts higher education's fundamental commitment to free expression, and for that reason alone should not be pursued.

### *B. Brand Protection v. Brand Expansion*

Drawing on data from the study, in this subsection I provide a few examples of online enforcement activity by colleges and universities that makes sense from the perspective of brand protection.<sup>266</sup> However, the majority of the subsection focuses not on sensible brand protection efforts, but rather, examples of what I deem senseless brand expansion by institutions of higher education and the related harms this activity creates. While the line between online brand protection and brand expansion admittedly is a thin one, data discussed in this subsection illustrate why colleges and universities should be sensitive to the distinction. I provide examples of how some institutions seem lured into expanding their brand online when restraint might better serve them.<sup>267</sup> I conclude by conjecturing how higher education's accretion of trademark rights might help explain higher education's brand expansion activity online.

As noted in Part III above, over one-third of the UDRP disputes located in my study involved domain names that incorporated entirely a college or university name. Examples from the dataset include <westernwashingtonuniversity.com>,

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<sup>266</sup> Brand and trademark technically are distinct concepts, although trademark law arguably recognizes and protects the interests of brands without explicitly acknowledging that it does so. See Deven R. Desai & Spencer W. Waller, *The Competitive Significance of Brands*, CPI ANTITRUST CHRON., July 2014, at 3.

<sup>267</sup> To be clear, data from the study do not provide the ability to make comprehensive conclusions regarding institutional brand protection versus brand expansion. Indeed, these concepts are themselves a bit subjective and subject to debate in any given instance. Instead, I use the data from the study as a starting point for giving voice to this critical, yet heretofore overlooked, aspect of higher education's construction of space online.

<americanu.com>, and <lomalinda.org>.<sup>268</sup> Enforcement of trademark rights in these cases easily is justified from the standpoint of brand protection. All institutions naturally want to see their names protected to some extent outside of the .EDU, if for no other reason than the .COM and other extensions are highly trafficked areas of the online world, and allowing those unaffiliated with higher education to use the name of a college or university for an unrelated commercial purpose understandably seems unfair.<sup>269</sup>

However, some examples of college and university brand protection in online space seem to be at the edges of the kinds of harm institutions should be concerned about. For example, who will navigate to the specific <baylorofdallas.com> before trying the general <baylor.edu>?<sup>270</sup> How many will try the lengthy <coloradomesauniversity.com> before trying the shorter <coloradomesa.edu>,<sup>271</sup> or the unlikely <indiana-edu.com> before trying the more likely <indiana.edu>?<sup>272</sup> Regardless, the propriety of seeking to reflect the institution's corporate name in online space is consistent with widely-recognized brand and trademark protection strategies in the non-profit and for-profit spheres. Additionally, to the extent that the original registrant of one of these domain names used it in a misleading or mischievous way—for example, the original registrant of <indiana-edu.com> “submitted e-mails to third parties misrepresenting that Complainant's website was switching from the <indiana.edu> domain name to the disputed <indiana-edu.com> domain name”<sup>273</sup>—seeking to put an end to

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<sup>268</sup> See *Loma Linda Univ. Adventist Sci. Ctr. et al., v. JM XTrade, Inc.*, Joseph Martinez, WIPO Case No. D2009-0036 (Mar. 11, 2009) (Page, Arb.), <http://www.wipo.int/amc/en/domains/decisions/html/2009/d2009-0036.html>; *Western Wash. Univ. v. aak / Azra Ari Khan*, WIPO Case No. D2004-0049 (Apr. 5, 2004) (Barker, Arb.), <http://www.wipo.int/amc/en/domains/decisions/html/2004/d2004-0049.html>; *Am. Univ. v. Nente.com*, NAF Claim No. FA0409000323761 (Oct. 15, 2004) (Yachnin, Arb.), <http://domains.adrforum.com/domains/decisions/323761.htm>.

<sup>269</sup> Cf. AMY GAJDA, *THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION* 115 (2009) (“[U]niversities seek legal protection not only for marketable inventions, but also for their marketable identity, with increasing attention paid to ‘branding’ and cyber rights.”).

<sup>270</sup> See *Baylor Univ. v. Above.com Domain Privacy*, NAF Claim No. FA1306001504429 (Aug. 1, 2013) (Wilson, Arb.), <http://domains.adrforum.com/domains/decisions/1504429.htm>.

<sup>271</sup> See *Mesa State Coll. v. Don't Panic Bus. Techs.*, NAF Claim No. FA1106001393045 (Aug. 8, 2011) (Foster, Arb.), <http://domains.adrforum.com/domains/decisions/1393045.htm>.

<sup>272</sup> See *Ind. Univ. v. Linh Wang*, NAF Claim No. FA0902001247095 (Apr. 8, 2009) (Crary, Arb.), <http://domains.adrforum.com/domains/decisions/1247095.htm>.

<sup>273</sup> *Id.* at 2.

such use by filing a UDRP action is a reasonable and appropriate reaction.

Meriting more attention are some of the domain names involved in located UDRP actions that were categorized as “name-plus” (e.g., <stanford-talk.com>, <texaslonghornchecks.com>, <wvusports.com>, and <yale-explore.org><sup>274</sup>) and “other” (e.g., <uhealth.com>, <kuhf.com>, <virtualhospital.info>, and <julecollinssmithmuseum.com><sup>275</sup>). Seeking ownership of these and other domain names often seems to reflect institutional attempts to expand brands and online footprints beyond the typical or expected uses of brands by institutions in relation to educational services, or what Samantha King and Sheila Slaughter, writing in 2004, described as “the increasing commodification of cyber properties and universities’ . . . growing vigilance in protecting them.”<sup>276</sup> For example, the University of Texas is not in the business of manufacturing personal or business checks, yet it deemed the registration and use of <texaslonghornchecks.com> as a parked page with pay-per-click advertising disruptive enough to its operations to seek transfer of the domain name via a UDRP action.<sup>277</sup> One might reasonably question why, even if Texas A&M licenses the use of its logos for use and sale by others on negotiable instruments. Is the institution prepared to pursue registrants of <texaslonghorncoffeemugs.com>, <gianttexaslonghorncoffeemugs.com>, or <dishwashersafetexaslonghorncoffeemugs.com>? What about typo variations of the aforementioned, or domain names

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<sup>274</sup> See *W. Va. Univ. Bd. of Governors v. WV Sports Rep.*, WIPO Case No. D2011-2154 (Jan. 15, 2012) (Hill, Arb.), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2011-2154>; *Yale Univ. v. Yale Explore and movcom*, WIPO Case No. D2011-1367 (Oct. 3, 2011) (Lee, Arb.), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2011-1367>; *Bd. of Regents, Univ. of Tex. Sys. v. Domain Admin*, NAF Claim No. FA0806001208350 (July 31, 2008) (Condon, Arb.), <http://domains.adrforum.com/domains/decisions/1208350.htm>; *Bd. of Trs. of the Leland Stanford Jr. Univ. v. Computer Prod. Info.*, NAF Claim No. FA0302000146571 (Mar. 28, 2003) (McCotter, Jr., Arb.), <http://domains.adrforum.com/domains/decisions/146571.htm>.

<sup>275</sup> See *Univ. of Miami v. Marchex Sales, Inc.*, NAF Claim No. FA1301001478911 (Mar. 5, 2013) (Triana, Arb.), <http://domains.adrforum.com/domains/decisions/1478911.htm>; *Jule Collins Smith Museum of Fine Art at Auburn Univ. v. Khan, Zafar*, NAF Claim No. FA1205001445535 (June 23, 2012) (Carmody, Arb.), <http://domains.adrforum.com/domains/decisions/1445535.htm>; *Univ. of Hous. Sys. v. Salvia Corp.*, NAF Claim No. FA0602000637920 (Mar. 21, 2006) (Franklin, Arb.), <http://domains.adrforum.com/domains/decisions/637920.htm>; *Univ. of Iowa v. Juraj Vyletelka*, WIPO Case No. D2002-0349 (May 31, 2002) (Brown, Arb.), <http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0349.html>.

<sup>276</sup> Samantha King & Sheila Slaughter, *Sports 'R' Us: Contracts, Trademarks, and Logos*, in *SLAUGHTER & RHOADES*, *supra* note 9, at 272.

<sup>277</sup> See *Bd. of Regents, Univ. of Tex. Sys. v. Domain Admin*, NAF Claim No. FA0806001208350.

incorporating even more obscure products licensed by the institution, such as <texaslonghorncoffins.com>? The point is that if the university's brand is conceived in terms of everything on which its logos currently are affixed, or might be affixed, through a licensing arrangement, there is no articulable end in sight to the enforcement of institutional trademarks incorporated into domain names.

Similarly, what does West Virginia University's decision to seek transfer of <wvusports.com> via a UDRP proceeding say about the institution's conception of brand?<sup>278</sup> Would the institution have taken the same approach against the registrant of the hypothetical <wvuphysics.com> (for the physics department), or <wvuparking.com> (for the parking office)? As Baylor University's UDRP forays exemplify (see Table A-1 in Appendix A), at some point seeking transfer of every domain name that adds a generic word to the institution's trademark becomes unreasonable, even if prevailing law permits this activity and the brand owner is likely to prevail if it pursues it. Consider, in particular, <baylorsalsa.com>, <bayloryellowpages.com>, <baylorstore.com>, <baylorbanks.com>, and <baylorflorist.com>, transfer of all of which Baylor University sought and achieved via UDRP actions.<sup>279</sup>

Auburn University's UDRP over <julecollinssmithmuseum.com> presents related questions. In the actual UDRP decision, the panelist noted that the respondent had been using the domain name to display content "designed to mimic Complainant's official website which featured links to the <ticketmayor.com> domain name that is owned by Respondent. The domain name currently resolves to Respondent's <lawperiscope.com> site that advertises legal services."<sup>280</sup> These uses to which the respondent put the disputed domain name no doubt were

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<sup>278</sup> See *W. Va. Univ. Bd. of Governors v. WV Sports Rep.* WIPO Case No. D2011-2154.

<sup>279</sup> See *Baylor Univ. v. Earth Yellow Pages*, NAF Claim No. FA0907001274424 (Aug. 31, 2009) (Yachnin, Arb.), <http://domains.adrforum.com/domains/decisions/1274424.htm> (concerning <bayloryellowpages.com>); *Baylor Univ. v. Domains by Proxy, Inc.*, NAF Claim No. FA0802001145651 (May 26, 2008) (Limbury, Arb.), <http://domains.adrforum.com/domains/decisions/1145651.htm> (concerning <baylorsalsa.com> and <baylorflorist.com>, among other domain names); *Baylor Univ. v. Domain Park Ltd.*, NAF Claim No. FA0802001142634 (Mar. 25, 2008) (Carmody, Arb.), <http://domains.adrforum.com/domains/decisions/1142634.htm> (concerning <baylorbanks.com>, among other domain names); *Baylor Univ. v. Baylor Univ. c/o Bob Hartland*, NAF Claim No. FA0611000841917 (Jan. 2, 2007) (Carmody, Arb.), <http://domains.adrforum.com/domains/decisions/841917.htm> (concerning <baylorstore.com>, among other domain names).

<sup>280</sup> *Jule Collins Smith Museum of Fine Art at Auburn Univ. v. Khan, Zafar*, NAF Claim No. FA1205001445535, at 3.



harmful to Auburn's art museum, but would Auburn have pursued the UDRP if only the domain name had been used to display a parked page with pay-per-click ads, as was the case when the University of Utah filed a UDRP against the registrant of <redbuttegardens.org>, or the University of Houston filed a UDRP against the registrant of <kuhf.com>?<sup>281</sup> What if no one else had registered <julecollinssmithmuseum.com> and it were available to register; would Auburn have sought to register it?<sup>282</sup>

The problem presented by enforcement efforts like these is that once an institution decides that uses of domain names like <julecollinssmithmuseum.com>, <redbuttegarden.org>, and <kuhf.com> merit filing a UDRP complaint, articulating a stopping point may be hard to do given the array of activities in which colleges and universities are involved, and the multitude of programs sponsored by or units contained within any given institution. If the University of San Diego—whose sports teams are known as the Toreros (Spanish for *bullfighters*)—is willing to file a UDRP to obtain both <thetoreroystore.com> and <my-toreroystore.com>, which it did, which other domain names involving its team name would it or should it pursue?<sup>283</sup>

More to the point is that just because colleges and universities can seek to own ancillary domain names does not mean they should. In the referenced arbitration action involving the University of Houston and <kuhf.com>, the university enjoyed only common law rights in KUHf as used in relation to radio station services, and already owned registrations for both <kuhf.org> and <kuhf.net>. Apparently not satisfied that the non-profit, listener-supported radio station had two Internet domain name registrations in extensions commonly thought of as noncommercial, the university filed a UDRP action against

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<sup>281</sup> Red Butte Garden is the name of a botanical garden and arboretum operated by the University of Utah. See RED BUTTE GARDEN, <http://www.redbuttegarden.org> (last visited Mar. 6, 2015). KUHf are the call letters of a radio station affiliated with the University of Houston. See HOUSTON PUBLIC MEDIA, <http://www.kuhf.com> (last visited Mar. 6, 2015).

<sup>282</sup> The most likely answer to this question seems to be “perhaps.” Auburn University’s library purchased three top-level domain names in the early 2000s, because it wanted “memorable and advertising-savvy URL[s]” to use for promotional purposes. See Robert H. McDonald, *Why Your Library Needs a .Org, .Com, and .Net!*, COMPUTERS IN LIBR., Sept. 1, 2001, at 36, available at 2001 WLNR 13639837. Interestingly, as of Spring 2015, the three domain names the library purchased and once used (i.e., <aulibrary.org>, <aulibrary.com>, and <aulibrary.net>) are available for registration.

<sup>283</sup> Incidentally, as of June 2014, <my-toreroystore.com> was available to register, and <thetoreroystore.com> failed to resolve, not even four years after the UDRP decision awarding the transfer of those domain names to the university. See *Univ. San Diego v. Hot Nix Webs*, NAF Claim No. FA1010001355316 (Dec. 9, 2010) (Upchurch, Arb.), <http://domains.adrforum.com/domains/decisions/1355316.htm>.

the registrant of <kuhf.com>, who happened to be located in Riga, Latvia.<sup>284</sup> The registrant used the disputed domain name to display pay-per-click advertisements, or as the panelist put it, “links to competing and non-competing commercial websites from which Respondent presumably receives referral fees.”<sup>285</sup> Even though (i) the University of Houston owned no federal trademark registration for KUHF, (ii) domain names with four or fewer numbers or letters in them commonly sell on secondary markets for thousands of dollars, and (iii) KUHF literally could stand for many different things, in many different languages, the panelist found bad faith by the respondent, concluding that there was no “other possible explanation for Respondent choosing the letters KUHF, meaningless except as Complainant’s call letters.”<sup>286</sup>

To be sure, the respondent in that action was in the business of buying and selling domain names, many of which it uses only by displaying parked pages with pay-per-click advertising. But absent any offer to sell the domain name to the complainant, or active use of it by the respondent in a way that hurt the university—neither of which the panelist found to be present—the university’s interest in filing the UDRP seems questionable. The university appears to have pursued a legal process to obtain the domain name simply because it could, representing a vindication of the powerful apparatus of a public institution of higher education over an obscure foreign company whose business model few understand or respect.<sup>287</sup>

The motivation for brand expansion here may have been sound if the university contemplated using the domain name in a standalone, content-rich way. But even that explanation falls short. As of June 2014, a visit to <kuhf.com> redirects visitors to <houstonpublicmedia.org>, which suggests that the radio station’s primary conception of brand no longer revolves around its call letters.<sup>288</sup> Regardless, the university has added to its

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<sup>284</sup> See *Univ. Hous. Sys. v. Salvia Corp.*, NAF Claim No. FA0602000637920 (Mar. 21, 2006) (Franklin, Arb.), <http://domains.adrforum.com/domains/decisions/637920.htm>.

<sup>285</sup> *Id.* at 4.

<sup>286</sup> *Id.*

<sup>287</sup> Even presuming that the Latvian registrant had the University of Houston in mind when registering the offending domain name is questionable at best. Four-letter domain names are valuable precisely because four letters, not registered as a trademark, can stand for nearly anything in multiple languages (not just English) across the world.

<sup>288</sup> Some evidence exists that the university’s branding objectives may have changed in 2010, when it acquired another radio station formerly operated by students at Rice University. See Karen Everhart, *Adding 2nd Service in Houston, KUHF Buys*

arsenal of intangible rights a lightly-trafficked domain name it must pay to maintain, whose letters could mean anything, but whose availability to the rest of the world now is diminished, for as long as the university chooses to maintain the registration.

Also on the spectrum of brand expansion activity are efforts by two universities to wrangle control of domain names related to the field of healthcare, an increasing source of revenue for universities. In one case the university was successful, in the other it was not. The first dispute, brought by the University of Miami, involved the domain name <uhealth.com>.<sup>289</sup> The university owned only a design mark registration, registered in 2009, for a graphical rendering of the words UHEALTH UNIVERSITY OF MIAMI HEALTH SYSTEM, and enjoyed only common law rights in UHEALTH, when it filed the UDRP in 2013.<sup>290</sup> The disputed domain name was first registered in 2002, then acquired by the respondent in 2004, well before the university's claim of first use of the UHEALTH mark, in December of 2007.<sup>291</sup> Although the arbitration panelist was generous to the University of Miami in finding the institution had established rights in the mark UHEALTH, the panelist declined to find that the respondent had registered and used the domain name in bad faith, and therefore ruled in favor of the respondent.<sup>292</sup>

The second dispute is from 2002 and involved the University of Iowa's successful attempt to obtain ownership of <virtualhospital.info>.<sup>293</sup> In that case, the university actually owned a federal trademark registration for VIRTUAL HOSPITAL, dating back to 1997, as used in relation to "providing medical information, education, and instruction through database accessible by remote computer."<sup>294</sup> The respondent, located in Zilina, Slovakia, registered the disputed domain name

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*Rice U. Station*, CURRENT (Aug. 23, 2010), <http://www.current.org/wp-content/themes/current/archive-site/radio/radio1015houston.shtml>. Assuming, for the sake of argument, that the acquisition led the university to back away from touting KUHF as a brand in favor of the umbrella term "Houston Public Media," notable is the university's decision to maintain the <kuhf.com> registration for four years as essentially unused property.

<sup>289</sup> See *Univ. of Miami v. Marchex Sales, Inc.*, NAF Claim No. FA1301001478911 (Mar. 5, 2013) (Triana, Arb.), <http://domains.adrforum.com/domains/decisions/1478911.htm>.

<sup>290</sup> *Id.*; see also U.S. Reg. No. 3,629,399 (June 2, 2009).

<sup>291</sup> *Univ. of Miami v. Marchex Sales, Inc.*, NAF Claim No. FA1301001478911.

<sup>292</sup> *Id.*

<sup>293</sup> See *Univ. of Iowa v. Juraj Vyletelka*, WIPO Case No. D2002-0349 (May 31, 2002) (Brown, Arb.), <http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0349.html>.

<sup>294</sup> See U.S. Reg. No. 2,058,573 (May 6, 1997).

in 2001.<sup>295</sup> Prior to filing the UDRP complaint, the university wrote the respondent, asserted its trademark rights, and sought to purchase the disputed domain name from him.<sup>296</sup> The respondent replied that he “didn’t intend to break intellectual property rights of The University of Iowa. I have prepared another activities (sic) on my domain virtualhospital.info. With the stopping of those activities I shall lose 10,000 USD. This is my offer to sell my domain virtualhospital.info”<sup>297</sup> The respondent further alleged that the disputed domain name was the English-language equivalent of two domain names that he had registered in the ccTLD-extensions for the Slovak Republic and the Czech Republic (i.e., <virtualnanemocnica.sk> and <virtualninemocnice.cz>, respectively).<sup>298</sup>

The university was unwilling to pay the respondent more than the price of registering the domain name. The university also alleged that it “is actively involved in trademark licensing activities that utilize the term VIRTUAL HOSPITAL.”<sup>299</sup> Although the nature of those activities was not specified by the university, the panelist rather generously did his own fact-finding and found that the university had licensed use of its mark to hospitals in various countries where the mark also was registered, including Australia, Iceland, Japan, and Venezuela.<sup>300</sup> Because of the registrant’s offer to sell the domain name to the university for \$10,000, the panelist found that the bad faith element of the UDRP had been met, notwithstanding the respondent’s plausible arguments that he intended to use the domain name for legitimate non-commercial purposes, and was not aware of the university’s trademark registration in the U.S.<sup>301</sup> In short, the panel found that the university had a more compelling claim to the disputed domain, although reading the panelist’s decision, one cannot help but conclude that the respondent’s inability to fluently communicate in English jeopardized his ability to mount what otherwise might have been an effective defense.<sup>302</sup>

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<sup>295</sup> *Univ. of Iowa v. Juraj Vyletelka*, WIPO Case No. D2002-0349.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* (internal quotation marks omitted).

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> Others have noted the bias of some UDRP panels toward parties located in Western democracies, due to the abundance of domain name registries existing and operating in such countries. See, e.g., Julia Hörnle, *The Uniform Domain Name Dispute Resolution Procedure: Is Too Much of a Good Thing a Bad Thing?*, 11 SMU SCI. & TECH. L. REV. 253, 275 (2008) (“For example, for the .com generic top-level domain,

Both the University of Miami and the University of Iowa UDRP actions are remarkable in that they show the extent to which prominent universities are willing to go to protect trademarks of theirs—however ancillary to their core operations—in online space.<sup>303</sup> In the University of Miami action, even a poor set of facts did not dissuade the university from seeking control of a domain name that did not even explicitly reference the university. The university's cause was hurt by the fact that it waited over 10 years from the registration of the disputed domain name before filing a UDRP action. Additionally, the university did not enjoy federal trademark rights in UHEALTH (and even then only in a design mark) until seven years after the domain name was registered, which also prejudiced its efforts.<sup>304</sup> The University of Iowa UDRP action shows that even far-flung international actors are not immune from the brand expansion and enforcement efforts of American universities.<sup>305</sup>

In another twist on brand expansion, at least one university has used the UDRP to claim rights in a domain name that it alleged references *an alumnus* of the institution. Of course, the alumnus is no typical graduate, but rather a professional football player who won the Heisman Trophy while playing for the institution in question, Baylor University. Baylor filed the UDRP in November 2013, nearly three years after Robert Griffin III—also known by his nickname, RG3—graduated from the university, and more than two years after he threw his last pass as quarterback of Baylor's football team and entered the NFL.<sup>306</sup> The university owns no trademark in RG3's legal name or nickname, yet felt aggrieved when a

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most registrars are based in the U.S., Canada, Western Europe, some Asian countries . . . Australia, and New Zealand. However, a .com domain name registrant in, for example, Poland or Thailand would have to sign a registration agreement in a foreign language and thus conduct the proceedings in that language, as well as bear the cost of translation.”).

<sup>303</sup> By *ancillary*, I mean trademarks that do not consist of their name or the name of their athletic teams. My supposition is that few, even in Miami and Iowa City, are likely to associate UHEALTH and VIRTUAL HOSPITAL with the two respective institutions.

<sup>304</sup> See *supra* note 291 and accompanying text.

<sup>305</sup> Both of these cases support the contention that academic medicine increasingly looks like commercial medicine, with more dollars being spent on branding strategies that might be more usefully funneled toward patient care. *Accord* Thomas E. Andreoli, *The Undermining of Academic Medicine*, ACADEME, Nov./Dec. 1999, at 32 (arguing that “academic values are losing out to mercantilism,” and that patient care has suffered as a result).

<sup>306</sup> Because he redshirted a season, RG3 played his final season at Baylor (in 2011) as a student pursuing a master's degree in communications. See Robert Griffin, III, WIKIPEDIA, [http://en.wikipedia.org/wiki/Robert\\_Griffin\\_III](http://en.wikipedia.org/wiki/Robert_Griffin_III) (last visited Mar. 6, 2015).

fantasy football enthusiast registered the domain names <rg3baylor.com> and <rg3bu.com> and began using them for fantasy football purposes.<sup>307</sup> Owning federal registrations for both the word BAYLOR and the abbreviation BU, the university asserted that the disputed domain names were confusingly similar to its trademarks.<sup>308</sup> The panelist agreed, finding that the addition of the descriptive term ‘rg3’—“likely meant as an allusion to Robert Griffin III, who achieved fame while playing for Complainant’s football team”—did not vitiate Baylor’s rights in the domains.<sup>309</sup>

One wonders whether RG3—whose nickname as a professional athlete clearly has commercial value to *him*—prompted this enforcement activity, or even is aware of it. Visits in summer 2014 to the two domain names, whose transfer Baylor successfully achieved in December 2013, showed that neither resolved to a web page, which may suggest that RG3 did not benefit from his alma mater’s enforcement of his name. To what use these domain names will be put in the future, if any, will be interesting to watch.<sup>310</sup>

Many of the UDRP actions described in this subsection reflect an expanding conception of the university, one whose metes and bounds no longer are constrained by institutional name and athletic team names alone. As institutions’ conceptions of brand expand, so too will their perceived need to

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<sup>307</sup> See *Baylor Univ. v. Justin Cox*, NAF Claim No. FA1311001530937 (Dec. 20, 2013) (Pfeuffer, Arb.), <http://domains.adrforum.com/domains/decisions/1530937.htm>.

<sup>308</sup> As is typical of UDRP proceedings, a federal trademark registration provides wide latitude to the complainant mark-holder in defining the extent of its ownership interest. Accordingly, the panelist seemed not to consider the fact that BU could mean anything, including Boston University, which owns the registration for <bu.edu>.

<sup>309</sup> *Baylor Univ. v. Justin Cox*, NAF Claim No. FA1311001530937, at 5.

<sup>310</sup> Beyond Baylor, the RG3 UDRP action serves as an intriguing inflection point on the state of commercialization in higher education and intercollegiate athletics. As has come to light in recent litigation concerning the NCAA’s profiting from the use of student-athlete images and likenesses, institutional commercial interests in student athletes and the interests of the students themselves do not always align. See Brad Wolverton, *Documents in O’Bannon Case Raise Questions About Athletes’ TV Rights*, CHRON. HIGHER EDUC. (June 13, 2014), <http://chronicle.com/article/Documents-in-O-Bannon-Case/147137/>; see also King & Slaughter, *supra* note 276 (discussing deals that collegiate athletic coaches enter into with sportswear companies that may not be in the best interest of student-athletes). Sometimes, they even compete. Indeed, as student-athletes graduate or leave for professional leagues, the commercial interest of their alma maters in them grows, with universities channeling the graduates’ fame toward the institution’s own brand expansion and enforcement efforts, often without seeking their permission or providing them recompense. Baylor’s RG3 UDRP action stands as another example of this activity, beyond the now-familiar realm of the use of student-athlete images and likenesses in video games that financially benefitted the NCAA, member institutions, and their licensing agents to the exclusion of former student athletes.

seek out more space online and fight those who may have gotten there first.

Here, the interplay between trademarks and domain names merits reiteration and discussion. One must have rights in a mark in order to prevail in a UDRP action. Owning federal registration of a mark—while not necessary in order to prevail under the UDRP—enhances one's prospects of winning a UDRP action when one finds the mark incorporated into a disputed domain name. Thus, a trademark-domain name feedback loop exists: the stronger and more robust rights in marks that institutions acquire, in the form of a federal trademark registration or multiple registrations for different versions of the mark (or in different classes), the more domain name enforcement efforts present themselves as options to pursue, and success in those efforts becomes more likely, and thus attractive to institutional decision makers. In short, the more trademark rights an institution accumulates, the greater the online footprint the institution is able to claim in space outside of the .EDU, and the more attractive those spaces may appear to those charged with making enforcement decisions.

College and university behavior in the realm of trademark acquisition is relevant for this reason. Data indicate that lately, institutions have shown great zeal in accumulating rights in descriptive terms and phrases associated with the institution, no matter how loosely.<sup>311</sup> Increasing numbers of college- and university-owned trademarks refer not to the institution as a whole (in the form of its official name, seal, logo, nickname, or athletic team name), but rather to constituent parts of the institution, such as schools, programs, or even curricular initiatives.<sup>312</sup> Higher education's online presence may soon reflect these trademark trends, if it does not already. Domain names like <harvardessays.org>, <cornellrentals.com>, <yaleparentingcenter.org>, and <stanfordevents.com>—all of which were identified in the study conducted for this Article—may be quite commonly registered by colleges and universities, without their ever rising to the level of a UDRP dispute.<sup>313</sup> We

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<sup>311</sup> See Rooksby, *supra* note 10, at 390 (depicting a significant rise in trademark activity by colleges and universities in the past 15 years).

<sup>312</sup> *Id.* at 395.

<sup>313</sup> See Bd. of Trs. of the Leland Stanford Jr. Univ. v. Comp. Prod. Info., NAF Claim No. FA0303000146571 (Mar. 28, 2003) (McCotter, Jr., Arb.), <http://domains.adrforum.com/domains/decisions/146571.htm> (concerning <stanfordevents.com>, among other domain names); Yale Univ. v. Whois Agent, Whois Privacy Prot. Serv., Inc., WIPO Claim No. D2013-0405 (Apr. 25, 2013) (Elliot, Arb.), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-0405> (concerning <yaleparentingcenter.org>); Pres. & Fellows of

simply do not know because institutions do not divulge this information, and conducting a comprehensive search for all domain names owned by colleges and universities would be expensive and cumbersome.

To the extent colleges and universities are motivated to seek online space to further their brands, we do know that such efforts are far cheaper if carried out proactively as opposed to reactively. The cost of registering and maintaining a domain name is far less than pursuing arbitration or litigation to obtain the domain name once the institution realizes it does not own it. Whether we will see fewer UDRP actions filed by colleges and universities in the years to come, due to their becoming savvier and more proactive about domain name acquisition, will depend, in part, to what extent institutions have learned from the past and implemented internal procedures to help them systematically manage their acquisition and maintenance of domain names. As described in the following subsection, the data collected for this Article provide some basis for examining the cogency of institutional decision-making regarding domain name acquisition and management strategies, although many questions remain unresolved.

### C. *Mastering Domains?*

This subsection considers the extent to which higher education's construction and maintenance of online space, obtained using contentious dispute resolution mechanisms, reflects coherent strategies and sensible goals. I focus in particular on the ownership and use of domain names acquired by colleges and universities through contentious processes.

First though, on a general level, findings from the study conducted for this Article provide useful preliminary insight into administrative decision-making and conceptualization of online space. For reasons of brand expansion and brand protection discussed above, many institutions of higher education place value on controlling spaces outside of the .EDU extension.<sup>314</sup> While the number of UDRP actions filed by colleges and universities since the UDRP's inception is not

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Harvard Coll. v. A Happy DreamHost Customer, WIPO Case No. D2010-2184 (May 23, 2011) (Osborne, Arb.), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2010-2184> (concerning <harvardessays.org>); Cornell Univ. v. Steven Wells, NAF Claim No. FA0305000158423 (July 9, 2003) (Byrne, Arb.), <http://domains.adrforum.com/domains/decisions/158423.htm> (concerning <cornellrentals.com>).

<sup>314</sup> See *supra* Part IV.B.



overwhelming compared to the number of such institutions, data do seem to indicate a rather steady comfort with the use of the dispute resolution mechanism by colleges and universities since its inception. These findings contrast sharply with the data concerning college and university involvement in ACPA lawsuits, which have been *de minimis* from the start.<sup>315</sup>

Salient from the standpoint of institutional decision-making concerning intellectual property is what institutions choose to do with domain names that they win in UDRP proceedings. Analysis of the disputed domain names located in my study revealed that fully one-third of them were available to register or were not registered to the institution that had won transfer of the domain name, suggesting that the institution allowed the registration to lapse, whether intentionally or unintentionally.<sup>316</sup> This finding challenges any assumption that higher education's battles for cyberspace necessarily concern domain names that have some lasting value to the institution. In many cases, the data show that the institution no longer owns the domain name it once deemed important enough to fight over, not even five years after winning a UDRP action concerning the domain name.<sup>317</sup> While this finding may not be unique to higher education—other complainants, outside of higher education, often choose not to renew domain name registrations they win through arbitration—the finding does raise the question of whether the institution's involvement in the UDRP action was motivated by what a decision maker might deem practical necessity, as opposed to mere legal opportunity.

Also telling is what institutions choose to do with the domain names that they have won and still own. A visit to these domain names revealed that over 55% of them were not being used in any effective way.<sup>318</sup> That is to say, instead of displaying content or redirecting visitors to another web site affiliated with the institution, the majority of domain names that colleges and universities have fought to win display no meaningful information at all—either they did not resolve to a

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<sup>315</sup> This finding is not unique to higher education. ACPA lawsuits take longer to resolve and are more expensive to pursue than UDRP actions, which likely explains in part why rights holders of all sorts choose to bring more UDRP actions than ACPA lawsuits.

<sup>316</sup> See *supra* Part III.A.5.

<sup>317</sup> For five domains, the institution that initially won their transfer did not hold on to them, yet deemed them important enough to go after again, in subsequent UDRP actions, once someone else registered them. See *supra* note 198 and accompanying text.

<sup>318</sup> See *supra* Part III.A.6.

web page, or they displayed a parked page upon visit.<sup>319</sup> This finding suggests that institutions sometimes pursue transfer of domain names that they do not intend to use.

Admittedly, good reason exists as to why institutions choose not to use some of the domain names they have won. For example, Baylor University understandably does not want to redirect visitors to <baylorgirls.xxx> to the university home page, or use it to display content concerning its female students. Nor does it want to see anyone else register the domain name, so it continues to pay the registration fee and does not use it.<sup>320</sup> But why does Drexel University continue to pay to maintain its registration of <drexel.org>, which it won in a UDRP action in 2001, when it does not effectively use the domain name to display any content to the public? Other examples of non-used domain names, still owned as of July 2014 by the institutions that achieved their transfer through UDRP actions, include <tufts.mobi>, <notre-dame.com>, and <universityofcentralarkansas.com>.<sup>321</sup>

While one plausible explanation for the apparent non-use of these domain names by these institutions could be that they are using them for non-public facing purposes—namely, as domain names through which to route email—the more likely explanation seems to be that: (1) maintaining ownership of the domain name, but not effectively using it, provides some strategic value to the institution in that it blocks others from registering it, or (2) the domain name actually is of little importance to the institution, but the low cost of maintaining the registration means the institution faces no pressing reason to let go of it.

Regardless of the explanation, the result is the same: colleges and universities are willing to spend not insignificant sums of money to obtain and maintain domain names that they do not actually use in any traditional or meaningful sense. To the extent that the second explanation proffered above explains

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<sup>319</sup> *Id.*

<sup>320</sup> Harvard University must not feel the same way about <harvardgirlschool.com>; as of Spring 2014, it was available to register.

<sup>321</sup> See *Tufts Univ. v. Oneida Advisors LLC*, NAF Claim No. FA0808001219154 (Sept. 29, 2008) (Franklin, Arb.), <http://domains.adrforum.com/domains/decisions/1219154.htm> (concerning <tufts.mobi>); *Univ. of Central Ark. V. John Simms & John Barry*, WIPO Case No. D2002-0316 (May 31, 2002) (Hornig, Arb.), <http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0316.html> (concerning <universityofcentralarkansas.com>); *Univ. of Notre Dame v. 24/7*, WIPO Case No. D2001-1288 (Dec. 19, 2001) (Maher, Arb.), <http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-1288.html> (concerning <notre-dame.com>).

decision making more than the first, colleges and universities may be adrift in some of the cyber-battles they choose to wage, lacking facility when it comes to picking the kinds of fights that are worth fighting. The array of domain names located in my study that are of seemingly little consequence to higher education's core operations at least raises this question.

The competing explanation, reflected in the first explanation proffered above, is that colleges and universities show a savvy ability to acquire intellectual property for its strategic defensive value.<sup>322</sup> For-profit corporations often amass domain name registrations for the purpose of holding them, not using them.<sup>323</sup> If an attorney comes to know of a client's trademark that is reflected in an existing domain name the client does not own, filing a UDRP action against the domain name's registrant is a common strategy if the domain name might plausibly find its way into the search bar of any would-be customer or fan of the client's. In short, preventing someone else from owning a domain name—the use or non-use of which potentially could hurt the brand owner, or distract its fans or customers—often has value to the brand owner.

Relevant to this perspective is that as the Internet has matured and its users have become savvier about the nuances and functionalities of online space, prevailing business thinking in some quarters has shifted. A company cannot plausibly own every domain name that incorporates a company's trademarks. Variations of the English language are too many, as are the tools of the cybersquatter (such as using hyphens or common typos in the alphanumeric string of the domain name) and the trademark holdings of some companies, to make the

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<sup>322</sup> Cf. Carl Straumsheim, *Who Gets to Be a .Doctor?*, INSIDE HIGHER ED (Mar. 26, 2015), <https://www.insidehighered.com/news/2015/03/26/personalized-domain-names-bring-headaches-institutions-phd-holders> (noting that “as ICANN continues to delegate new domains, some colleges and universities are once again registering domains they will likely never use to prevent others from misusing their trademarks.”).

<sup>323</sup> See, e.g., MARK S. SPARSCHU, *NEW TRADEMARK AND COPYRIGHT PROTECTION ISSUES IMPACTING IP ATTORNEYS AND BRAND HOLDER CLIENTS* (2012), available at <http://www.brookskushman.com/LinkClick.aspx?fileticket=Drag9DRigBc%3d&tabid=95> (noting the struggle brand owners face in choosing which domain names to defensively register in view of limited budgetary resources); Karol A. Kepchar, *Next Generation Domain Name Strategies: .COM, .NAME, .BIZ, .INFO...Dot What?*, METROPOLITAN CORP. COUNSEL, Feb. 1, 2002, at 10, available at <http://cdn.akingump.com/images/content/9/3/v4/933/192.pdf> (noting the value to brand owners of defensive domain name registrations across TLDs); Todd Shields, *Expansion of Web Upsets Businesses*, J. GAZETTE, Apr. 16, 2013, at A8, available at 2013 WLNR 9336541 (noting that risk-averse companies defensively register domain names); Taylor Buley, *Um.whatever*, FORBES (Oct. 30, 2008, 10:40 AM) <http://www.forbes.com/forbes/2008/1117/038.html> (citing a report that estimated the cost to businesses of defensive domain name registration in the new gTLDs to be \$1.6 billion).

mass acquisition of domain names an advisable or even feasible defensive business strategy. As the venerable computer science scholar Milton Mueller has noted, “it is impossible for a company to prevent someone from incorporating its name into a domain name in some way . . . the DNS supports too many variations to make it possible to preempt criticism or capture all possible references to a company or a product.”<sup>324</sup>

These realities, and the conflicting explanations for the trends identified in my study’s data, lead one to question whether college and university use of the UDRP reflects a mature understanding of brand protection in cyberspace, an outdated conception of brand protection in cyberspace, or something else. In short, in defining their domain outside of the .EDU space, have colleges and universities conscientiously determined when UDRP enforcement is justified, not just legally, but as a matter of policy?

My study’s data, which did not account for the strategic goals of decision makers responsible for initiating the contentious actions identified, unfortunately are inconclusive on this point. Follow-up qualitative research into this question likely would find that the answer to when enforcement activity makes sense is without an objective answer across rights holders, with higher education being no different. Tolerance for risk and expense, and the value of perceived rewards that may come from enforcement, undoubtedly vary by institution. Nearly 15 years of UDRP and ACPA lawsuit data provide some illumination, but in the history of the Internet, these limited data may tell us little about enforcement strategies for the future. The fact that domain name enforcement may be styled as low stakes—compared to, say, patent infringement litigation, cases involving torts on campus, or a discrimination or tenure denial lawsuit—only adds weight to a hypothesis that decision making in this realm likely is more idiosyncratic than it is reflective of established policies.

#### *D. Higher Education’s Cyber Future*

What does the future hold for college and university battles for cyberspace? Informed by findings from the study, this subsection tenders some general prognostications, as well

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<sup>324</sup> MUELLER, *supra* note 18, at 251 (further calling any attempt to protect massive clouds of names “pointless unless draconian and undesirable restrictions are placed on the use of DNS”).

as offers modest considerations that should inform college and university decision making in this space.

### 1. Future Battles for Online Space

Past behaviors by colleges and universities in the realm of cyberspace may not necessarily be predictive of tomorrow's challenges. The advent and sudden ubiquity of apps and cloud-based user interfaces provide plausibly attractive reasons for thinking that fighting for ownership of domain names is a phenomenon of the past. Today's Internet users seeking information about a given institution probably are just as likely to visit a virtual store on their smartphone or tablet device to see if "there is an app for that," or to conduct extensive search engine searches or visit known third-party social media platforms, as they are to reach out into the .COM space and enter a precisely-worded domain name. In short, students seeking housing in Ithaca know to go to Craigslist or Facebook; who cares about <cornellrentals.com>?<sup>325</sup>

But so long as institutions continue to listen to the advice of counsel specializing in intellectual property, higher education's battles for cyberspace likely will continue, no matter the enduring strategic importance *vel non* of domain names. Institutions will battle those who register domain names that are being used in ways that could reflect poorly on the institution, or cause confusion as to the institution's endorsement, affiliation, or approval (as was the case for <cornellrentals.com>) of content displayed at the domain name.

And rightfully so from a practical and legal perspective. While the failure to enforce a trademark against a cybersquatter typically does not put the institution at risk of losing rights in its mark, the existence of a right and a technical grievance with a third party can make low-stakes enforcement look appealing. To the extent that institutions are too quick to take advantage of these proceedings signals not a shortcoming in the law—the cards are stacked generously in favor of all mark holders, not just colleges and universities—but rather an opportunity for

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<sup>325</sup> <cornellrentals.com> was the subject of a successful UDRP action brought by Cornell University in 2003. See *Cornell Univ. v. Steven Wells*, NAF Claim No. FA0305000158423 (July 9, 2003) (Byrne, Arb.), <http://domains.adrforum.com/domains/decisions/158423.htm>. Respondent was found to have used the domain name in connection with a web site "offering assistance to apartment seekers and landlords in locating housing in Ithaca, New York." *Id.* at 2.

institutional decision makers to focus on the implications of contentious domain name acquisitions.

The challenge contentious domain name acquisition presents for higher education is, therefore, mostly one of policy: articulating institutional interest in enforcing intellectual property online. Will the institution take a constrained approach, seeking to limit the domain name battles it chooses to wage, or will it view its trademark holdings as manifest destiny, seeking to reflect in online space all manner and variation of its intangible rights?<sup>326</sup>

What I call a constrained approach to this subject recognizes that trademark rights enforcement should be viewed with reluctance when identified harms are more theoretical than actual. This approach is more consistent with a public-facing, public-serving conception of higher education and its treatment of intellectual property, albeit one that policymakers increasingly find unsustainable in view of budgetary pressures and stiff market competition. Often in seemingly inevitable fashion, when policymakers consider institutional intellectual property, higher education's might makes right and individual institutions' legal rights make might. And so the cycle continues.

Although protecting the brand does not require the institution to expand the brand, the former often elides into the latter, whether the institution intends that consequence or not. The problem stems in part from the fact that the modern college or university must be all things to all people. Its constituents are many, as are its purposes.<sup>327</sup> In higher education's ever-expanding quest for revenue, hardly any activity, endorsement, or affiliation is unbelievable, meaning more cyberbattles likely wait to be fought. Colleges and universities no longer exist merely to provide educational services; their boundaries with all aspects of the commercial sphere are much more porous. In this new world order for higher education, protecting the brand first requires defining the brand, and the definition often seems to flow from the efforts at protection. In short, combining a college or university trademark in a domain name with nearly any descriptive word

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<sup>326</sup> Institutions face a similar choice when it comes to acquisition and enforcement of other forms of intellectual property.

<sup>327</sup> See, e.g., Nicholas Lemann, *The Soul of the Research University*, CHRONICLE REV., (Apr. 28, 2014), <http://chronicle.com/article/The-Soul-of-the-Research/146155/> ("[H]igher education is expected to do so many things—teach everything from philosophy to prison administration, operate winning sports programs, provide in-person management of the transition from adolescence to adulthood, make local economies prosper, be direct providers of medical care, and on and on.").

or phrase—be it a product, service, geographic place, or even a famous alumnus's nickname—may lead to legal action, no matter the actual extent of harm to the institution.<sup>328</sup>

A potential lesson to be drawn from this Article is a sense of when contentious acquisition of domain names is a path a college or university ought to pursue. Recognizing that every institution is different, as is every domain name, and coming from the perspective that a constrained approach to intellectual property enforcement better serves higher education than opportunistic enforcement, I offer the following nine questions as ones institutions should consider as they determine whether to pursue enforcement action to obtain a domain name:

**1. Does the disputed domain name incorporate a trademark that people outside of the institution actually associate with the institution?** If not, chances are the disputed domain name represents merely an enforcement opportunity, not an enforcement necessity, driven by the fact the institution owns registration of a trademark not central to its core operations. Not every trademark owned by the institution is of equal importance. Online enforcement opportunities should be viewed accordingly. Disputes over domain names not involving an institution's trademarked name, or the use of the institution's trademarked name in combination with something else, should be carefully considered and in most instances avoided.<sup>329</sup>

**2. Is the disputed domain name one that the institution envisions using in a meaningful sense (i.e., using it to display content), years into the future?** If not, chances are the disputed domain name is not essential for the institution to own, and an enforcement proceeding should not be brought.

**3. Did the disputed domain name come to the attention of an internal decision maker because of a reasonable complaint of confusion by someone who encountered it?** If not, the institution should seriously question the extent of any harm perceived. Simply because the domain name registration exists, the domain name displays a parked page, or legal counsel brought the domain name's existence to the attention of someone internally does not mean that the institution should act.

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<sup>328</sup> Examples of this activity from the dataset, not previously mentioned in the Article, include <huskerfevercard.com>, <sufacebook.com>, and <ucfindie.com>. See *Univ. of Central Fla. v. Knight Publ'g, Inc.*, NAF Claim No. FA0505000485962 (July 13, 2005) (Richard, Lowry, Fink, Arbs.), <http://domains.adrforum.com/domains/decisions/485962.htm>; *Syracuse Univ. v. Red Ant Hosting*, NAF Claim No. FA0409000332354 (Nov. 9, 2004) (Yachnin, Arb.), <http://domains.adrforum.com/domains/decisions/332354.htm>; *Bd. of Regents of the Univ. of Neb. v. Karolke*, WIPO Case No. D2003-0307 (June 18, 2003) (Knopf, Arb.), <http://www.wipo.int/amc/en/domains/decisions/html/2003/d2003-0307.html>.

<sup>329</sup> In my study, I labeled as "other" the types of domain names involved in disputes of this nature. See *supra* Part II.A.1 & Part III.A.3.

4. **Is the disputed domain name being used to criticize or parody the institution in a way that is unlikely to confuse consumers into thinking that the institution is affiliated with the domain name?** If so, the institution should decline to act, recognizing that asserting trademark rights to obtain the domain name is inconsistent with the traditional academic commitment to free expression (and, in any event, would be futile in stopping the critical expression).

5. **Is the disputed domain name actively being used in a way that tarnishes the institution (e.g., by associating it with pornography, or illicit or illegal activity)?** If so, seeking to capture the domain name is reasonable, provided the tarnishment is actual and not merely hypothetical. Domain names merely capable of tarnishing the reputation of the institution, but not actively being used for such purpose, do not present a compelling case for action.<sup>330</sup>

6. **Is the disputed domain name being used in a commercial manner, in such a way that consumers reasonably may be confused into thinking that the domain name is affiliated, sponsored, or endorsed by the institution?** If so, enforcement action may be justified. However, decision makers should be sensitive to the nature of the trademark incorporated in the domain name. Common abbreviations or geographic descriptors arguably may reference things or places other than the institution.<sup>331</sup> Just because the institution owns a federal trademark registration for an abbreviation or term incorporating geographically descriptive language does not mean any unauthorized recitation of that character string should lead to enforcement activity. The existence of confusion regarding the sponsorship, affiliation, or approval of the domain name by the institution should be actual, not hypothetical. Relatedly, and notwithstanding what UDRP case law permits, institutions should carefully consider any opportunity to enforce their rights online when the commercial use to which the disputed domain name is being put is merely as a parked page, displaying pay-per-click advertising. Domain names in common extensions that are exact replicas of the institution's trademarked name present perhaps the only compelling instances when taking such action is reasonable.<sup>332</sup>

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<sup>330</sup> For example, Creighton University should decline to seek transfer of the hypothetical domain name <creightongirls.com>, unless it were actively being used to in a tarnishing fashion.

<sup>331</sup> To some, the letters UVA may call to mind the University of Virginia. To Spanish-speakers, *uva* means grape. The University of Virginia therefore should consider <uvaspain.com> an appropriate target for enforcement if the hypothetical domain name were being used to promote university study programs in Spain. Enforcement would not be appropriate if the hypothetical domain name were being used to advertise bike tours through Spanish wine country.

<sup>332</sup> Only first-time Internet users even conceivably could be confused into thinking that parked pages are sponsored, endorsed, or affiliated with any non-profit institution of higher education. However, when someone registers a college or university's trademarked name in a commonly trafficked extension (e.g., .COM, .ORG, or .NET), and uses it for pay-per-click advertising, the annoyance presented by this third-party registration and activity warrants enforcement action.



7. **Is the disputed domain name in a commonly trafficked domain name extension, like .COM, .ORG, or .NET?** If not, institutions should have ample justification for deciding to pursue enforcement. Few Americans turn to web sites in esoteric extensions—such as .INFO, .BIZ, .MOBI, any of the non-US country-code extensions, or even the newly created gTLDs—in search of reliable information. Even domain names entirely reflective of an institution's name are not worth pursuing in non-mainstream extensions such as those previously mentioned, absent the presence of more compelling considerations. Institutions preemptively should seek registrations of domain names reflective of their names in those extensions commonly trafficked. Leave the esoteric extensions alone, and resist any temptation to be drawn into unnecessary battles over obscure spaces.

8. **Is the disputed domain name a typographical misspelling, broadly conceived, of one of the institution's trademarks?** If so, decline to pursue enforcement absent the presence of more compelling considerations.

9. **Is the disputed domain name owned by someone known to be affiliated with the institution (e.g., a current student or alumnus)?** If so, and enforcement otherwise is reasonable, attempt to resolve the dispute informally without resorting to initiating a UDRP or ACPA action. At the same time, beware of the precedent that may come from resolving the dispute extra-judicially, and refrain from paying or exchanging with the registrant anything of value in excess of the cost of registering the domain name.

The above questions may help college and university decision makers assess when seeking to capture a domain name registered to a third party is consistent with a constrained approach to intellectual property protection and enforcement.<sup>333</sup> These questions, however, are not meant to be exhaustive or contemplative of potentially all relevant considerations, nor is any one of them dispositive of the ultimate decision whether to act. Instead, these questions are meant to provide a checkpoint on an activity that can seem attractive because of expansive institutional trademark holdings, and because success in UDRP actions is statistically probable.<sup>334</sup> However, the leniency of most UDRP panels in deciding each factor in favor of the mark holder should not be an invitation to act.

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<sup>333</sup> In this regard, the original goals of the UDRP and the ACPA—to prevent the bad faith registration and use of domain names, not to reward efforts at brand expansion—should always drive any decision to enforce.

<sup>334</sup> See *supra* notes 138, 215, 311-12 and accompanying text.

## 2. Additional Considerations

One practical consideration bearing on higher education's cyber future concerns the limits of online space itself. As colleges and universities continue to grow in operation and complexity, amassing with them terabytes of digital data, funneling all aspects of their online identities and activities into one domain name may become technically unwieldy, if not downright unworkable. Simply put, the problem is one of breadth and depth: institutions generate too much content, reflective of thousands of people engaged in diverse activities and offerings, to effectively channel all of it through but one domain name. As additional online space becomes available (like the .COLLEGE and .UNIVERSITY extensions, to name but two), the more attractive new digital corners of the cyberworld may become to colleges and universities looking to grow, both in terms of the audiences they reach and the network infrastructures they create to support their intangible webs and expanding market orientations.

One also must ponder the impact that online education and MOOCs might have on college and university conceptions of space online. Many students may never set foot on a traditional campus in the twenty-first century, instead receiving their degrees and certifications in exchange for completing competency-based curricula online. For these students, higher education's online space may be viewed as treasured space, and the legitimizing and authenticating functions of higher education's online domains are likely to be as important as ever. In this regard, online space promises to be the brick-and-mortar of the quintessential college quadrangle, and just as graffiti artists and vandals of those structures are prosecuted to the fullest extent of the law, cybersquatters also can expect to continue to face legal consequences for their actions.

Central to all of these visions of higher education's cyber future is the continued role of the university as a public sphere, a space that Professor Brian Pusser calls "at once physical, symbolic, cultural, political, and semantic, not in relation to the state or the broader political economy but as a site of complex, autonomous contest in its own right."<sup>335</sup> As our understanding of the contours of institutions increasingly becomes shaped by our virtual interactions and what we see online, the importance

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<sup>335</sup> Brian Pusser, *Reconsidering Higher Education and the Public Good: The Role of Public Spheres*, in GOVERNANCE AND THE PUBLIC GOOD 17 (William G. Tierney ed., 2006).

of higher education's metaphysical existence cannot be understated. Battles for control and rights to domain names that a college or university views as its prerogative tap into a larger contest over competing orientations and views of higher education as serving public goods or existing for private gains. These battles cannot be divorced from the concept of ownership itself. Many seek to use actual or imagined affiliations with institutions of higher education for their own private advantage, and third party registration of domain names containing college and university trademarks often reflects this motivation. How higher education chooses to respond to these instances of outside claims of ownership or affiliation invites renewed examination of the proper placement of higher education in society and stands to influence our perception of the industry as an instrument of public good. Domain names—themselves a hybrid creature imbued with symbolic, cultural, political, and semantic significance—do not just package the public sphere, but themselves reflect it. For this reason alone, I predict that contests over higher education's cyber future may not soon diminish in number or importance as we enter the next chapter of the Internet's history.

## CONCLUSION

This Article's historical examination of the .EDU extension and its empirical investigation of higher education's battles for cyberspace is timely in view of the unprecedented expansion of the DNS root zone currently underway. Unlike so many other industries, higher education received from the Internet's architects its own domain name extension, the .EDU. While the entity that has managed the extension has changed over the past 30 years, as have the rules for who may register domain names in the extension, the guiding premise of the extension remains the same: higher education is distinct from other industries, and that distinction merits recognition in virtual space.

But as data reported in this Article reveal, the allocation to higher education of distinct online space does not mean that institutions of higher education have not had to fight to define their domain. One hundred institutions have affirmatively harnessed the power of their trademark holdings to expand or defend the online space they claim as theirs. The purpose of this Article has been to reveal these efforts and examine their policy implications for higher education. Much of the activity is explainable as the necessary workings of the academic enterprise in the twenty-first century. One

inescapable fact is that colleges and universities have powerful trademarks and brands, and many within and outside of those institutions would like to use those intangible items for their own private purposes and profits.

But not all battles for cyberspace by colleges and universities are so easily dismissed as the work of good lawyering for complex enterprises operating in the knowledge economy. Some of the patterns and case-based anecdotes described in this Article raise questions regarding the types of battles various institutions have chosen to fight and how they have chosen to fight them. While none of the illustrative cases discussed in Part IV was representative of the entire dataset, in some instances, constrained use of intellectual property rights in light of higher education's historical placement in the public sphere seems to have given way to a more corporate-influenced conception of intellectual property and its enforcement. In short, some of higher education's battles for cyberspace seem inessentially fought, leaving as the wounded those who believe that more intellectual property protection and enforcement do not always serve the public's interest when the ones wielding the rights are publicly-funded and public-serving. The questions I offered in Part IV.D.1 above for the consideration of college and university decision makers hopefully may serve as an initial line of defense in the face of such forces.

The insights provided in this Article form a small but important narrative in the growing body of knowledge about how higher education uses its intangible rights and assesses enforcement priorities. One might conclude that in defining their domain online, colleges and universities are making important choices that reflect the value they attribute to intangible rights and conceptions of space. Perhaps there is no perfect prescription for when to engage in battles for cyberspace; every institution's needs and constraints are different, as are their tolerances for risk. But one fact seems certain: online space is important space, increasingly so as entire degree programs move online, or even are born in the virtual world. These spaces go to the heart of how we conceptualize higher education in the public sphere, as a public-facing entity increasingly pulled in private, rights-rich directions, simultaneously influenced by concerns for commerce, brand, and academic missions. At this intersection of priorities and values, made all the more pronounced and visibly contested in cyberspace, we find an industry struggling to use private rights in service of a greater public good, an

industry whose behaviors occasionally seem schizophrenic, as the dual motives of self-preservation and self-aggrandizement intermix.

As the venerable and late higher education leader Clark Kerr described American higher education, writing in 1963, well before the advent of the Internet, “it is not really private and it is not really public; it is neither entirely of the world nor entirely apart from it. It is unique.”<sup>336</sup> And so it is with the important but often overlooked spaces that colleges and universities continue to forge for themselves online.

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<sup>336</sup> CLARK KERR, *THE USES OF THE UNIVERSITY* 1 (5th ed. 2001).

## APPENDIX A

This Appendix lists in Table A-1 all domain names subject to UDRP actions filed by Baylor University, as located in the study.

**TABLE A-1**  
**Domain Names Subject to UDRP Actions Filed by Baylor University**

baylor.com
baylor-university.com
baylorcollege.com
bayloruniversity.com
bayloredu.com
baylor.org
baylordallas.net
baylordallas.org
bayloreye.org
baylorhospital.com
baylorraids.com
baylorfan.com
baylorgrapevinehospital.com
baylorhospitaldallas.com
baylormedicalcenter.com
baylormedicalschool.com
baylormedicine.com
baylordentalschool.com
baylorhospitalindallas.com
baylorhospitaljobs.com
baylorplan.com
baylorschoolofnursing.com
baylorstore.com
baylorwaxahachie.com
baylorhospitals.com
baylor-alum.com
baylorcollegemd.com
baylorgrad.com
baylor-law.com
baylor-student.com
bayloralum.com

baylormba.com
baylorstudent.com
baylorbears.biz
baylorbears.name
baylorbears.net
baylorbearssuck.com
baylorbears.tv
baylormedicalcenteratirving.com
baylorhealthcaregarland.com
baylormedicalcenterhospital.com
baylorregionalmedicalcenter.com
baylorcollegemedicine.com
baylorschools.org
baylorbanks.com
baylorfrisco.com
ihatebaylor.com
baylorcommunity.com
baylorpsychiatrist.com
baylorpsychiatry.com
bayoralumniliving.com
baylorcrave.com
baylorflorist.com
baylorfriscoivf.com
baylorhospital.mobi
baylorhospitals.mobi
baylorkehoe.com
baylorlocators.com
baylorsalsa.com
baylorsportstalk.com
baylorsportstalk.net
baylormedicalhospital.com
baylorjobs.com
baylorhelth.com
baylorofirving.com
baylorhospitalgarland.com
baylornursery.com
baylorrivals.com
baylorumc.com
baylormedicalcenter.com
baylogroup.com

baylorlambdas.com
cmebaylor.com
baylordentalcollege.com
baylordental.com
bayloryellowpages.com
baylorhomecoming.com
baylormedicalschool.com
baylorbkstr.com
baylormedicalclinic.com
baylorcme.com
fansofbaylor.com
baylorcareers.com
universityofbaylor.com
baylorhealthsystems.com
baylordowntown.com
baylorhosptial.com
mybaylor.com
baylorsing.com
baylorhealthcenter.com
baylorhealth.com
bayloruniversityu.com
searchbaylorhealth.com
baylorhostipal.com
mychartbaylorclinic.com
baylorgarland.com
baylorofgarland.com
thebaylorstore.com
baylorgirls.xxx
baylorhospitaljobs.com
baylorsucks.com
mybaylorlogin.com
baylorjobs.com
baylornation.com
baylorstadium.net
baylorheath.com
bayloralumnigaming.com
bayloralumnilottery.com
bayloralumnonline.com
baylorbearsgaming.com
baylorgaming.com



baylorlottery.com
bigbaylorfan.com
belmontbaylor.com
belmont-lofts-baylor.com
belmontloftsbaylor.com
thebelmontbaylor.com
baylorfootballstadium.com
baylorriverfrontstadium.com
baylorsportsnet.com
bybaylor.com
baylorofdallas.com
4mybaylor.com
baylorallsaintshospital.com
bayloruniversity.com
justbuit.com
gobusong.com
baylorhealth.com
rg3baylor.com
rg3bu.com

# The Ugly Truth about Legal Academia

Meera E. Deo, JD, PhD<sup>†</sup>

*The Diversity in Legal Academia (DLA) project is the first formal, comprehensive, mixed-method empirical examination of the law faculty experience, utilizing an intersectional lens to investigate the personal and professional lives of legal academics. This Article reports on the first set of findings from that study, which I personally designed and implemented. DLA data reveal that ongoing privilege and institutional discrimination based on racism and sexism create distinct challenges for particular law faculty. Interactions between women of color law faculty and both their faculty colleagues and their students indicate persisting racial and gender privilege, resulting in ongoing bias. These findings cry out for law schools to intensify efforts at strengthening rather than de-emphasizing diversity, as many may be tempted to do during this period of great turmoil in legal education. In fact, law schools should provide greater institutional support to faculty, which will help not only those who are underrepresented, marginalized, and vulnerable, but all law faculty, law students, and the legal profession overall. This Article draws from both quantitative and qualitative data gathered from this national sample of law faculty to focus on the ways in which race, gender, and the combination of the two affect law faculty interactions with colleagues and students. It also proposes individual strategies and structural solutions that can be utilized in order for legal academia to live up to its full potential.*

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Key words: legal education, legal profession, Law & Society, women in law, intersectionality, empirical methods in Critical Race Theory (eCRT)

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## INTRODUCTION

For decades, the diversity debate in courts, public opinion, and academic circles has centered on student diversity.<sup>1</sup> There has been virtual silence on the topic of diversity in academia. This may be because there has never been a formal, comprehensive, empirical study of law faculty to inform the debate.

“Yet, faculty diversity may be especially critical today based on the unique challenges facing legal academia.”<sup>2</sup> With law school applications at record low levels and shrinking enrollment at many schools, some law schools have adopted aggressive cost-cutting measures, with more drastic changes likely ahead.<sup>3</sup> Faculty hiring has decreased or ceased altogether at many law schools.<sup>4</sup> A few law schools have begun firing faculty and staff, as well as closing facilities.<sup>5</sup> While faculty of color and female faculty have been underrepresented in legal academia since law schools first opened their doors, recent changes threaten to deplete their numbers even further.<sup>6</sup>

Ironically, just as law schools are poised to decrease their attention on faculty diversity, it may be in their best interest to elevate its importance. Law schools are changing to adapt to coming times, becoming more student-centered, focusing more on skills-based learning, and creating other incentives to attract students and keep them in school. Prospective students may be especially drawn to law schools

<sup>1</sup> See generally *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-14 (1978); Kathryn Alfisi, *Diversity in Higher Education: Is Affirmative Action Nearing its End?*, WASH. LAWYER (Dec. 2012), <http://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/december-2012-affirmative-action.cfm>; Adam Liptak, *Justices Take Up Race as a Factor in College Entry*, N.Y. TIMES, Feb. 22, 2012, at A1; *Room for Debate: Diversity Without Affirmative Action?*, N.Y. TIMES (May 13, 2013), <http://www.nytimes.com/roomfordebate/2013/05/13/can-diversity-survive-without-affirmative-action>.

<sup>2</sup> Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 352, 354 (2014).

<sup>3</sup> A DISTURBING TREND IN LAW SCHOOL DIVERSITY, <http://blogs.law.columbia.edu/salt> (last visited Feb. 15, 2015) (describing declining law school enrollment rates for African American and Mexican American students); see also Chelsea Phipps, *More Law Schools Hagggle on Scholarships*, WALL ST. J., (July 29, 2012, 9:23 PM), <http://online.wsj.com/article/SB10000872396390444130304577557182667927226.html>.

<sup>4</sup> Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL ST. J. (July 15, 2013, 4:39 PM), <http://online.wsj.com/news/articles/SB10001424127887323664204578607810292433272>.

<sup>5</sup> See THOMAS M. COOLEY LAW SCHOOL STATEMENT (July 1, 2014), <http://www.cooley.edu/news/statement.html>; see also Dan Filler, *Retrenchment at Thomas Cooley Law*, FACULTY LOUNGE (July 03, 2014, at 9:22 AM), <http://www.thefacultylounge.org/2014/07/retrenchment-at-thomas-cooley-law.html> (discussing Cooley’s announcement regarding “faculty and staff layoffs and other cutbacks”).

<sup>6</sup> See Katherine Barnes & Elizabeth Mertz, *Is It Fair? Law Professors’ Perceptions of Tenure*, 61 J. LEGAL EDUC. 511, 512 (2012).

that have diverse faculty, and existing students may be more likely to stay in school when they are engaged in learning, mastering practical material, and connected with the institution overall.<sup>7</sup> All of these goals are more likely to be achieved when diverse faculty stay employed at institutions of legal education.<sup>8</sup>

Though abysmal, the lack of numeric representation of women of color, white women, and men of color in legal academia tells only part of the story; to grasp the full context, we must also evaluate the faculty experience. In other words, we must “look beyond [the numbers] to examine the quality of the academic experience” for diverse faculty.<sup>9</sup> Only by understanding workplace challenges can we seek to reverse the low retention rates for diverse faculty; doing so would likely increase retention rates for students as well. Until now, there has not been a mechanism for evaluating the experience of diverse faculty. No formal mixed-method empirical study has investigated the experience of law faculty, examining how race and gender create challenges and opportunities for particular law faculty.

This Article presents the first set of findings from the Diversity in Legal Academia (DLA) study, which itself represents the first formal, empirical, mixed-method study of the law faculty experience utilizing an intersectional lens. As the Principal Investigator of the DLA study, as well as the author of this Article, I am wholly responsible for the project. I designed the mixed-method study, from conception through dissemination. I personally conducted each of the 93 interviews with legal academics and collected all survey data from DLA participants.<sup>10</sup> I also am responsible for coding and analyzing the rich set of mixed-method empirical data that resulted from these interviews and surveys, which are presented here and in numerous anticipated future manuscripts drawing from DLA.<sup>11</sup>

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<sup>7</sup> See, e.g., VINCENT TINTO, *LEAVING COLLEGE: RETHINKING CAUSES AND CURES OF STUDENT ATTRITION* 124 (2d ed. 1993).

<sup>8</sup> Mentorship and other strong connections between faculty and students have also been shown to increase student retention. See, e.g., Meera E. Deo & Kimberly A. Griffin, *The Social Capital Benefits of Peer Mentoring in Law School*, 38 OHIO N.U. L. REV. 305 (2011).

<sup>9</sup> Rachel F. Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503, 505 (1986).

<sup>10</sup> I am indebted to Catherine Albiston, Linda Pololi, Harmony Rhoades, and Renee Reichl for useful conversations on the DLA study design. The Principal Investigators of the Educational Diversity Project, Walter Allen, Charles Daye, Abigail Panter, and Linda Wightman, also deserve recognition for inspiring the mixed-method design used in DLA. Any errors or methodological limitations are my own.

<sup>11</sup> A book proposal drawing from DLA data has been solicited by Stanford University Press. Immediately forthcoming DLA articles include the following: Meera E. Deo, *A Better Tenure Battle*, 31 COLUM. J. GENDER & L. (forthcoming Aug. 2015);

The DLA study examines both the personal and professional lives of law faculty members, from Assistant Professor through Dean Emeritus, exploring whether and how the race and gender of individual legal academics affect their experience as law professors. Only 7% of law professors are women of color; yet, this appalling lack of diversity has been largely ignored in the academic literature.<sup>12</sup> The DLA study pioneers this exploration with a methodologically rigorous investigation into the experiences of law faculty, specifically examining similarities and differences based on race and gender.

DLA findings reveal that significant ongoing discrimination haunts legal academia, with intersectional bias a clear barrier to success for many non-traditional law teachers, and especially for women of color law professors. Documenting and acknowledging both the climate of white male privilege and broader institutional bias is a first important step in eliminating it, thereby improving the learning environment for all students and the work environment for all law professors. This Article proposes detailed necessary next steps: strategies to ameliorate both overt and implicit bias through specific individual and structural changes.

In Part I, this Article begins with a brief presentation of literature on the law faculty experience and relevant frameworks of intersectionality, privilege, structural and institutional discrimination, and implicit bias. Part I also shares statistics on current legal academics, as well as an introduction to the DLA data and analytical approach. A more detailed account of the relevant literature, data collection technique, analytical approach, and initial hypotheses for the DLA study have been laid out in a separate article.<sup>13</sup>

Parts II and III present findings from the DLA study that indicate many ways in which racial and gender

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Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 FORDHAM L. REV. 3115 (2015); Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. (forthcoming June 2015).

<sup>12</sup> See 2008-2009 AALS Statistical Report on Law Faculty: Race and Ethnicity, AALS FAR.COM (on file with author). For many years AALS maintained basic statistical data on law faculty members by race and gender on its website, including at the following link: <http://aalsfar.com/statistics/2009dlt/race.html>. By December 2014, the relevant pages had been removed from the AALS website. In spite of numerous requests by the author of this Article and others for explanation, retrieval, and reinstatement of this data, AALS has not responded in any way and the data remains missing from the AALS website. It is therefore unavailable to those who conduct research on American law faculty. The author welcomes correspondence from anyone with additional information regarding the data or from those who have sought the data to no avail.

<sup>13</sup> See Deo, *supra* note 2, at 375-77.

discrimination continue to run rampant in legal academia, both in overt and potentially actionable encounters as well as through more subtle acts and implicit bias. Part II focuses on challenging workplace interactions with fellow faculty. DLA findings make clear that racial and gender privilege create distinctly different experiences for racial minorities and women as compared to white male law faculty—even in terms of how they perceive their relationships with one another. Part III presents analytical findings on faculty-student interactions, including student confrontations of particular underrepresented faculty in the classroom and beyond. Again, race and gender color these interactions, with white women and women of color sharing experiences with students that differ significantly from how white male colleagues describe interactions with students.

In Part IV, the Article draws from the data to distill best practices and reasonable responses, suggesting strategies for addressing the specific challenges of ongoing racial and gender discrimination in legal academia. Summarizing and synthesizing these findings, the Conclusion proposes specific structural changes. The Article ends with a bullet-pointed list of strategies that administrators, other institutional leaders, and even faculty colleagues can adopt to eliminate or at least ameliorate many of the challenges the data reveal.

## I. SETTING THE STAGE

To fully grasp findings from the DLA study, this Part outlines the relevant literature, presents the methodological approach of the study, and shares basic demographic statistics of current law faculty. The literature discussed includes existing studies of law faculty as well as various frameworks employed throughout the Article, including intersectionality, privilege, and implicit bias.

### *A. Framing the Law Faculty Experience*

In Spring 1989, law professors Derrick Bell and Richard Delgado published an article entitled, “Minority Law Professors’ Lives: The Bell-Delgado Survey.”<sup>14</sup> That article reported on an informal investigation into the professional lives of law faculty of color, with a focus on descriptive analysis of

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<sup>14</sup> Richard Delgado & Derrick Bell, *Minority Law Professors’ Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989).

specific topic areas.<sup>15</sup> The authors found that law faculty of color in the mid-1980s faced “discrimination in hiring and promotion, alienation among their colleagues, hostility from students, and a lack of support.”<sup>16</sup> Though those findings were non-generalizable and non-comparative, they provide valuable insights into the professional challenges facing the few legal academics of color at the time.<sup>17</sup> The authors of the study had dismal predictions for the future, expecting little institutional interest in even addressing these challenges.<sup>18</sup>

Perhaps unsurprisingly given their prediction, no follow up survey has taken place. In the intervening 15 years, only a handful of studies have looked into legal academia from the law faculty perspective and none have employed an intersectional lens to specifically consider how race and gender combine to affect the experiences of legal academics at various stages of their careers.<sup>19</sup> No study has fully investigated the law faculty experience. None has looked into both the personal and professional lives of both tenured and pre-tenured faculty. No research has considered the ways in which race and gender may play a unique role in the experiences of legal academics at various stages of their careers.<sup>20</sup> Nevertheless, two recent academic projects have been instrumental in setting the stage for the DLA study.

One empirical study recently published in the *Journal of Legal Education* reports that there are “continued difficulties” facing law faculty of color and female law faculty of

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<sup>15</sup> The Bell-Delgado study findings include discussion of the following areas: Time Pressure, Academic Freedom, Relations with Colleagues, Relations with Students, Appointments, Research Support, Committee Responsibilities, Bread-and-Butter Issues & Upward Mobility, Institutional Climate, Ghettoization, and Job Satisfaction. *Id.* at 355.

<sup>16</sup> Deo, *supra* note 2, at 369-70 (internal citations omitted); *see also* Delgado & Bell, *supra* note 14.

<sup>17</sup> Delgado & Bell report that their relatively low response rate cautions against generalizability; they also did not include white faculty as participants. *See* Delgado & Bell, *supra* note 14, at 354, n.17 & n.19.

<sup>18</sup> *Id.* at 369-70.

<sup>19</sup> On the other hand, empirical studies of the law student experience have become slightly more common. *See* Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63 (2011) (discussing numerous studies of law student diversity and the law student experience generally).

<sup>20</sup> Throughout this Article the term “race” is used to signify both “race” and “ethnicity.” While race deals more generally with the social construct of one’s phenotypical or morphological presentation, and ethnicity refers more to individual or ancestral national/regional-origin, the term “race” is used throughout simply for ease of reading. For more on the differentiation between race and ethnicity, and their interplay with the law, *see* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1145 (2004).



color specifically.<sup>21</sup> That article focuses on tenure, reporting that a much higher percentage of female professors of color view the tenure process as unfair (35%) as compared to white males (12%).<sup>22</sup> A negative campus climate, challenging law school culture, and implicit bias contribute to the overall “negative themes” characterizing the experience for many people of color in legal academia.<sup>23</sup> While that study reports on how tenured faculty remember their pre-tenure experience, untenured faculty were excluded from participation.<sup>24</sup>

Another significant contribution to the literature is *Presumed Incompetent*, an anthology exploring the experience of female faculty of color in a variety of academic disciplines.<sup>25</sup> The chapters covering the law faculty experience draw from a rich narrative tradition<sup>26</sup> and reveal personal challenges as well as compelling discussions of structural impediments to success.<sup>27</sup> Many reflections on the law faculty experience by women of color note challenges navigating a hostile campus climate and suggest mechanisms for coping with ongoing institutional bias.<sup>28</sup>

DLA joins both of these recent studies by drawing from a framework of intersectionality, which acknowledges the challenges facing particular individuals whose identity is bound up with the “intersection of recognized sites of oppression.”<sup>29</sup> Because of the multiple “opportunities” for oppression, it becomes clear that those who are marginalized in multiple ways have experiences that differ from not only the norm (at most law schools, this would be the middle- to upper-class, heterosexual, white male), but even from the norms attributed to particular

<sup>21</sup> Barnes & Mertz, *supra* note 6, at 511-12.

<sup>22</sup> *Id.* at 516-17.

<sup>23</sup> *Id.* at 522-23.

<sup>24</sup> *Id.* at 512.

<sup>25</sup> PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutierrez y Muhs, Yolanda Flores-Niemann, Carmen G. Gonzalez, & Angela P. Harris eds., 2012).

<sup>26</sup> See, e.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1269 (1993) (“Narrative occupies a similar role in both feminist legal theory and critical race theory.”).

<sup>27</sup> See, e.g., Elvia R. Arriola, “No hay mal que por bien no venga”: A Journey to Healing as a Latina, Lesbian Law Professor, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA, *supra* note 25, at 372 (discussing her personal challenges as a woman of color at an unsupportive predominantly white institution).

<sup>28</sup> For further discussion on these themes from *Presumed Incompetent* and on the relevant literature generally, see Deo, *supra* note 2.

<sup>29</sup> RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 51-55 (2001).

minority groups.<sup>30</sup> For instance, women of color may suffer oppression based on a combination of their race and gender, which differs from individuals who are racial minorities (e.g., Black) but in the majority with regard to gender (e.g., male). Similarly, gay men of color face oppression based on both their race and their sexual orientation; their experiences tend to differ from those of both white gay men and heterosexual men of color. Yet, they still enjoy male privilege. In the traditionally white male establishment of legal academia, one would therefore expect that people of color would have unique experiences as compared to whites, that women would have different experiences from men, and that women of color—doubly marginalized by race and gender—would have different experiences still.<sup>31</sup> In fact, contemporary research continues to rely “on the categories ‘men’ and ‘women’ and not—as we might have hoped—on the intersections of categories of gender, race, ethnicity, age, and sexual orientation. Sometimes a further delineation, ‘people of color,’ has been made—oftentimes, however, without distinguishing experiences of women and of men.”<sup>32</sup>

What social scientists call “structural racism” and legal academics call “institutional racism” largely refer to the same<sup>33</sup>

<sup>30</sup> For more on Critical Race Theory and intersectionality specifically, see generally PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (2d ed. 2000); EVELYN NAKANO GLENN, *UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR* (2002); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1990-1991).

<sup>31</sup> While most scholarship drawing on a framework of intersectionality focuses on the challenges or oppression facing groups that are marginalized across multiple dimensions, there could be opportunities for benefits based on these identity characteristics as well. See, e.g., Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2152 (2013) (discussing instances where whites have capitalized on the racial identity of people of color for the social and economic benefit of whites themselves). The DLA study, on the other hand, contemplates how race and gender could create benefits even for those from marginalized groups. See Deo, *supra* note 2, at 352.

<sup>32</sup> Judith Resnick, *A Continuous Body: Ongoing Conversations About Women and Legal Education*, 53 J. LEGAL EDUC. 564, 569 (2003). This Article, too, sometimes collapses various racial/ethnic and even gender categories to discuss experiences of “women of color,” “women,” and even “people of color” collectively. However, when done here, it is because the empirical data reveals similarities between women of color from different non-white racial/ethnic groups, women as a whole (white and non-white), or between people of color regardless of racial/ethnic background (including both men and women). Also, the emphasis on intersectionality throughout the Article is on the combination of race and gender specifically. Issues involving class, sexual orientation, age, and other identity characteristics are woven throughout though not the explicit focus of this study.

<sup>33</sup> Though they refer to the same system, institutional discrimination refers to bias within particular institutions embedded in society, while structural discrimination refers to the collection of these various institutions and the broader

“complex, dynamic system of conferring social benefits on some groups and imposing burdens on others that results in . . . denial of opportunity for millions of people of color.”<sup>34</sup> Sexism, homophobia, and other social ills can fit similarly within this broad framework, where we assume that those in the dominant group (e.g., males) structure aspects of society within their control to further the interests of the dominant group at the expense of those with less power (e.g., women).<sup>35</sup> Intersectionality is thus a natural lens through which to consider discrimination in legal academia, and we can think of those who exercise their power over doubly marginalized individuals as operationalizing *intersectional discrimination*.<sup>36</sup>

Racism and other “-isms” refer to internally held biases or stereotypical beliefs about individuals from particular groups that are based on that identity characteristic, while discrimination refers to the exercise of power over others based on whatever “-ism” is at play.<sup>37</sup> Thus, “racial discrimination refers to unequal treatment of persons or groups on the basis of their race or ethnicity.”<sup>38</sup> In addition, a person holding racist views can exercise power over a person of color to deny her a job or refuse to sell her a car. This is racial discrimination. A person holding sexist views can exercise power over a woman by harassing her in the workplace or through sexist verbal abuse that draws from that power. This is gender discrimination.

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structure that encompasses them. See Fred L. Pincus, *Discrimination Comes in Many Forms: Individual, Institutional, and Structural*, in READINGS FOR DIVERSITY AND SOCIAL JUSTICE 31 (Adams et al. eds., 2000).

<sup>34</sup> Meera E. Deo, *Two Sides of a Coin: Safe Space & Segregation in Race/Ethnic-Specific Law Student Organizations*, 42 WASH. U. J.L. & POL’Y 83, 116-20 (2013) (quoting William M. Wiecek, *Structural Racism and The Law in America Today: An Introduction*, 100 KY. L.J. 1, 5 (2011-2012)). For more on social science literature on structural racism, see EDUARDO BONILLA-SILVA, WHITE SUPREMACY & RACISM IN THE POST-CIVIL RIGHTS ERA 11 (2001); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 79 (2d ed. 1994) (asserting that “the major institutions and social relationships of U.S. society—law, political organization, economic relationships, religion, cultural life, residential patterns etc.—have been structured from the beginning by the racial order”); Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 469 (1997). Legal scholar Ian Haney López has also argued similar sentiments using the term “institutional racism.” See, e.g., Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

<sup>35</sup> See generally DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE (2014).

<sup>36</sup> Some have called this “‘complex’ bias.” See, e.g., Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439 (2009).

<sup>37</sup> Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 182 (2008).

<sup>38</sup> *Id.*

The intersectional discrimination discussed in this Article refers to the ways in which institutional policies and practices, as well as institutional leaders, exercise not only white privilege to discriminate against people of color, or male privilege to discriminate against women, but also the combination of white male privilege to discriminate against women of color.<sup>39</sup>

In fact, privilege itself is another framework that must be considered when examining bias in legal academia. Privilege is “the systemic conferral of benefit and advantage [based on] affiliation, conscious or not and chosen or not, to the dominant side of a power system.”<sup>40</sup> Privilege can be dissected into three main points. First, privilege provides systemic—ongoing and structural—advantages rather than simply one-time individual benefits. Second, privilege is often “largely invisible to those who reap its benefits.”<sup>41</sup> Those aware of their privilege do not necessarily choose to accept it; yet, it cannot easily be rejected. Even individuals who are disadvantaged or lack privilege tend not to challenge the status quo, as many believe that the existing structure is normal, unavoidable, and based on merit.<sup>42</sup> Third, the benefits associated with privilege are based on external association with the power structure. In other words, when external actors identify an individual as affiliated with a group considered powerful within a given context, that individual receives the associated privileges.

For various categories, one can easily determine which groups are powerful and which are not; individuals associated with powerful groups are privileged, while the others are not accorded advantage. For instance, when considering socio-economic status, wealthy people have more power than poor; those believed to be wealthy and associated as such will therefore have greater privilege. In the race context, whites have more power and therefore more privilege than those identified as Black, Latino, Asian American, Native American,

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<sup>39</sup> Much of the past scholarship on intersectionality has focused on who is excluded, i.e., “when African American women claim race discrimination, their experience is measured against that of sex-privileged (that is, male) African Americans; when African American women claim gender discrimination, their experience is measured against that of race-privileged (that is, white) women.” Kotkin, *supra* note 36, at 1482 (citing Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, *supra* note 30, at 140).

<sup>40</sup> STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 29 (1996).

<sup>41</sup> Deo, *supra* note 34, at 114 (discussing WILDMAN, *supra* note 40, at 28).

<sup>42</sup> WILDMAN, *supra* note 40, at 29.

or as belonging to some other racial/ethnic group.<sup>43</sup> Highly-educated people have greater power than those with low levels of education, and receive privilege based on their elite educational status. Men, as a group, have more power, and therefore more privilege, than women. Heterosexuals have more power than those in the LGBTQ community, resulting in those identified as “straight” receiving privilege based on their sexual orientation.

To be sure, not all discrimination is conscious or purposeful. Perhaps the most pervasive and destructive type of discrimination is based on implicit bias. Implicit bias includes thoughts and behaviors that “affect social judgments but operate without conscious awareness or conscious control.”<sup>44</sup> In fact, “the term ‘implicit’ emphasizes our unawareness of having a particular thought or feeling,” while, in contrast, “‘explicit’ emphasizes awareness of having a thought or feeling.”<sup>45</sup> Because it is based on subconscious thought, “implicit bias [often] coexists with egalitarian beliefs and the denial of personal prejudice.”<sup>46</sup> Thus, these “attitudes, beliefs, or thoughts [are ones] that people hold but may explicitly reject” were they to think about them explicitly.<sup>47</sup> In other words, though we may think or feel something impulsively based on implicit bias, and even act on that bias exercising discrimination, it is based on subconscious feelings that “we might even reject ...as inaccurate or inappropriate upon self-reflection.”<sup>48</sup>

Implicit bias is especially dangerous because it infects even those who believe themselves to be egalitarian. Because it is not based on conscious thought but operates “automatically and outside of rational awareness,”<sup>49</sup> implicit bias “leak[s] into everyday behaviors such as whom we befriend, whose work we value, and whom we favor—notwithstanding our obliviousness

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<sup>43</sup> Of course, there is relative privilege too, where certain groups may not be at the pinnacle of the hierarchical structure yet still enjoy some privilege. They may also be privileged with regard to a particular status (e.g., class) while not privileged in another (e.g., gender). See Kathleen J. Fitzgerald, *White Privilege*, in *ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY* 1404 (Richard T. Schaefer ed., 2008) (“[P]eople can be oppressors within one status hierarchy, while in others they may be disadvantaged. And more than likely, most people are both at some time or another . . .”).

<sup>44</sup> Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 467 (2010).

<sup>45</sup> *Id.* at 469.

<sup>46</sup> Victor Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 198 (2013).

<sup>47</sup> Gregory S. Parks et al., *Implicit Race Bias in Tort Jury Decision Making* (forthcoming 2015) (on file with the author).

<sup>48</sup> Kang & Lane, *supra* note 44, at 469.

<sup>49</sup> Parks et al., *supra* note 47.

to any such influence.”<sup>50</sup> It exists in our everyday lives, our workplaces, our justice system, and other institutions—including legal academia.<sup>51</sup>

Combining the framework of intersectionality, privilege, and implicit bias, we see the ways in which those who lack privilege along multiple axes face additional hurdles than even those who lack privilege along just one axis. A “minority within a minority” is doubly or even triply disadvantaged. As an example, “Black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender.”<sup>52</sup> Though Black women are Black, leadership within their racial community may not fully appreciate their experience as women and instead privilege the male experience; similarly, though Black women are women, the feminist movement may not fully understand their experience as Black and instead privilege the white experience. The Black woman’s relative outsider status with regard to each group may not be based on purposeful discrimination from other group members, but instead result from implicit bias. The Black woman is nevertheless excluded.

Legal institutions, including law schools, are not exempt from racial and gender privilege and implicit bias. In fact, as institutions of great power and privilege, law schools are an especially interesting site for a study investigating intersectional discrimination. In one sense, there is nothing unique about law schools, nothing that suggests that there would be greater racist or sexist incidents at these particular institutions over others. Law schools have historically been elite, white, male institutions, though this is true of many American institutions and certainly of most American institutions of higher learning.<sup>53</sup> Yet, since intersectional discrimination parallels institutional racism, it is similarly “all-pervasive, infecting the very institutions that support communities, civic bodies, and society broadly.”<sup>54</sup> Thus, law schools are simply one set of a number of institutions that are reflective of society as a whole, including

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<sup>50</sup> Kang & Lane, *supra* note 44, at 467-68.

<sup>51</sup> For more on implicit bias in courts, see Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

<sup>52</sup> See Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politic*, *supra* note 30, at 3.

<sup>53</sup> BONILLA-SILVA, *supra* note 34, at 97-98; OMI & WINANT, *supra* note 34, at 79; Meera E. Deo, *Ebbs & Flows: The Courts in Racial Context*, 8 RUTGERS RACE & L. REV. 167 (2007).

<sup>54</sup> Deo, *supra* note 34, at 119.

even subtle intersectional discrimination that many women of color face on a daily basis in society at large.<sup>55</sup> These “microaggressions” can be defined as “subtle verbal and non-verbal insults directed toward non-Whites, often done automatically or unconsciously.”<sup>56</sup> Because microaggressions are often “layered insults based on one’s race, gender, class, sexuality, language, immigration status, phenotype, accent, or surname,” they specifically anticipate intersectionality and draw from a framework of intersectional discrimination.<sup>57</sup>

As social institutions, law schools likely suffer from many of the same social ills of society as a whole. Still, one might argue that law schools would have less formal discrimination (i.e., that which is clearly illegal) than non-legal institutions, since they are the workplace of many people well versed in the law. Thus, to the extent that we can generalize findings discussed in this Article to other educational institutions, or even to corporate and other non-legal workplace settings, conclusions of bias presented here may be underinclusive of the intersectional discrimination occurring on campuses and in other work environments without numerous attorneys in positions of power.

Yet, the actual effects of ongoing intersectional bias in legal academia may be even more significant than in other environments, as the high-status position of “law professor” should be one that rewards merit and rejects bias, providing for upward mobility and meaningful social change for the families and communities connected with individual law professors. In a sense, if things are unfair, inequitable, or biased in legal academia, what hope do we have for other professions, academic institutions, workplaces, and campuses? If this avenue does not truly provide opportunities for advancement, there is little hope that other positions can create those changes. Improving the environment in law schools can thus not only enrich law teaching, legal education, and the legal profession, but also serve as an example to other professional and educational environments for how to contribute to social change generally.

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<sup>55</sup> In fact, since they are “microcosms of larger society, schools ‘are often the arenas in which the schisms and conflicting values of the larger society are played out and become crystallized.’” Meera E. Deo, *Separate, Unequal, and Seeking Support*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 9, 19 (2012) (quoting RUTH SIDEL, *BATTLING BIAS: THE STRUGGLE FOR IDENTITY AND COMMUNITY ON COLLEGE CAMPUSES* 8 (1994)).

<sup>56</sup> Daniel Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO/A-LATINO/A L. REV. 15, 17 (2002).

<sup>57</sup> *Id.*

### *B. Data Collection and Methodological Approach*

The DLA study is the first comprehensive empirical study of law faculty that investigates the personal and professional lives of legal academics with an intersectional (race/gender) lens.<sup>58</sup> The author of this Article is also the Principal Investigator of the DLA study. I am wholly responsible for study design, from inception through final dissemination of books and articles. I personally designed the survey instrument that participants completed and the interview questions that they answered. I also maintain responsibility for all coding and analysis of the quantitative and qualitative data, including creation of a coding schema, maintenance of a codebook, and the actual coding and analysis of the transcript data from DLA interviews and surveys.

Methodologically, DLA draws from empirical sociological methods to incorporate both survey and in-depth interview data from 93 legal academics employed in tenured or tenure-track positions at ABA-accredited and AALS-member schools during the 2013 calendar year.<sup>59</sup> Data collection followed a target sampling technique. Target sampling is a well-established technique for data collection in statistics, sociology, public health, and other arenas; it is especially valuable for identifying and securing participation in empirical

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<sup>58</sup> For more discussion on the methods employed in the DLA study, see Deo, *supra* note 2.

<sup>59</sup> The decision to include participants from only ABA-accredited and AALS-member schools follows the tradition started by other established scholars who have done so to ensure a high and uniform standard of all participants. See Deo, *supra* note 2, at 375 n.154 (discussing correspondence with Herma Hill Kay on the decision of many researchers to follow this selection criterion). Similarly, including only tenured or tenure-track faculty and excluding librarians, clinicians, adjunct professors, and legal writing instructors (even those who are tenured/tenure-track) parallels other published studies in this arena. See Deo, *supra* note 2, at 377 n.167 (citing Herma Hill Kay, *U.C.'s Women Law Faculty*, 36 U.C. DAVIS L.REV. 331 (2003) and Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 803 (1988)); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 206 (1997); Elyce H. Zenoff & Kathryn V. Lorio, *What We Know, What We Think We Know, And What We Don't Know About Women Law Professors*, 25 ARIZ. L. REV. 869, 871-72 (1984) (counting only tenure-track faculty, defined as "professor, associate professor, or assistant professor, unmodified by any other term such as adjunct, clinical, visiting, or emeritus" and noting that "[l]ibrarians, although usually tenure-track, were excluded because they constitute a distinct career line"). In addition, historically Black institutions were not included in the sample, as faculty from those institutions also tend to have significantly different experiences than those at predominantly white schools. See Douglas A. Guiffrida, *Othermothering as a Framework for Understanding African American Students' Definitions of Student-Centered Faculty*, 76 J. HIGHER EDUC. 701, 701-03 (2005).



research from vulnerable or hard-to-reach populations.<sup>60</sup> First, a *seed group* of faculty members was selected to participate based largely on their diversity across a number of dimensions, including race/ethnicity, gender, institutional ranking, geographic region of employment, tenure status, and employment title/position.<sup>61</sup> Every participant completed a survey, which asked about interactions with colleagues and students, sources of emotional and professional support, future career aspirations, and a range of attitudinal and experiential issues. A one-on-one interview followed, where research subjects answered more nuanced questions regarding professional interactions, entry to the legal academy, mentoring relationships, work/life balance, and sources of support.

The penultimate question on the survey asked each participant to nominate others to join the study; new participants were then carefully selected from this pool of nominated faculty to ensure not only that all eligibility characteristics were satisfied, but also to maintain the robust diversity of the original sample.<sup>62</sup> Thus, as the potential sample grew throughout data collection based on nominations of every new participant, selections and corrections could be made to ensure the generalizability of the final sample. This painstaking nomination-plus-selection process yielded the 93 participants in the study, who were selected to represent the full range of diversity in legal academia. This methodological approach is the most viable and sound process for this type of study, as there is no central database of women of color law faculty

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<sup>60</sup> See Deo, *supra* note 2, at 379-80 (discussing research employing this methodological technique by the following renowned scholars: Katherine Browne, *Snowball Sampling: Using Social Networks to Research Non-heterosexual Women*, 8 INT'L J. SOC. RES. METHODOLOGY 47 (2005); Leo A. Goodman, *Snowball Sampling*, 32 ANN. MATH. STAT. 148 (1961); D.D. Heckathorn, *Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations*, 44 SOC. PROBLEMS 174, 175 (1997); J.K. Watters & P. Biernacki, *Targeted Sampling: Options and Considerations for the Study of Hidden Populations*, 36 SOC. PROBLEMS 416, 420 (1989)).

<sup>61</sup> The original, or "seed," participants were purposefully selected to be diverse with regard to these characteristics and these domains were formally tracked while selecting additional participants from among those nominated. In addition, age, sexual orientation, and disability status were loosely tracked to ensure representation in the sample.

<sup>62</sup> While one critique of snowball sampling is that the sample may not be truly representative, target sampling seeks to avoid bias by painstakingly tracking numerous domains in order to ensure representation in the final sample. This methodological approach is most commonly used in hidden or vulnerable populations that are unlikely to respond to "cold" or uninvited contact from a researcher. Though critics may still believe the final sample is not as representative as a truly random sample, the target snowball sampling technique was utilized in DLA because it was the best way to ensure participation from the "vulnerable" population of women of color legal academics. For more on the sampling technique and its use in DLA, see Deo, *supra* note 2, at 379-82.

members.<sup>63</sup> All participants were assigned pseudonyms; these are used in the findings section in lieu of actual names to preserve anonymity.

The diverse participants in the DLA study thus represent various faculty positions, from Assistant Professor to Dean Emeritus, ranging from highly selective to “access” schools, in every region of the country. The sample also has robust gender and racial/ethnic representation, with participation from both women and men who self-identify as White, African American, Latino, Asian/Pacific Islander, Native American, Middle Eastern, and Multiracial.<sup>64</sup> Because of the intersectional (race/gender) focus of the study, women of color were oversampled and represent the *core sample*, comprising 63 of the 93 participants. Comparative samples of white men, white women, and men of color are included to add perspective and place the intersectional experience in context. Detailed race and gender statistics are provided in Table 1.

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<sup>63</sup> While there is an AALS Directory of Law Teachers that allows law faculty of color to “opt in,” this would be problematic as an original pool of possible participants because it is likely underinclusive (not all law faculty of color opt in) in potentially meaningful ways (those who opt out may have significant differences from those who opt in, which would not be reflected in a pool drawn only from the Directory). In addition, the names listed there are not disaggregated by gender or ethnicity; thus, it is not comprehensive or particularly useful for an intersectional study of how race/gender affect the law faculty experience. *Directory of Law Teachers*, ASS’N OF AM. L. SCHS., [www.aals.org/about/publications/directory-law-teachers/](http://www.aals.org/about/publications/directory-law-teachers/) (last visited Feb. 26, 2015).

<sup>64</sup> Racial/ethnic categorization is always challenging, in part because it is a social construction. See, e.g., Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3 (1994). DLA uses self-identification of participants in both the survey and interview. The terms “African American” and “Black” are used interchangeably throughout the Article to refer to those who self-identified using those terms. Participants who identified as “API,” “Asian,” “Asian American,” or within one of the pan-ethnic Asian-American identities are identified as “Asian American,” while those who self-identified as “Latino” or “Hispanic” are referred to as “Latino.” Those who identified only as “white” are identified as such in the Article. Multiracial participants are those who self-identified as having two or more racial/ethnic backgrounds.

TABLE 1. DLA PARTICIPANTS, BY RACE & GENDER, DLA 2013  
(N=93)

	Male	Female	TOTAL
<b>Black</b>	4 (4.3%)	21 (22.6%)	25 (26.9%)
<b>Asian/Pacific Islander</b>	3 (3.2%)	15 (16.1%)	18 (19.4%)
<b>Latino</b>	2 (2.2%)	13 (14.0%)	15 (16.1%)
<b>Native American</b>	1 (1.0%)	5 (5.4%)	6 (6.5%)
<b>Middle Eastern</b>	1 (1.0%)	2 (2.25)	3 (4.4%)
<b>Multiracial</b>	1 (1.0%)	7 (7.5%)	8 (8.6%)
<b>White</b>	7 (7.5%)	11 (11.8%)	18 (19.4%)
<b>TOTAL</b>	19	74	93

### C. Demographic Details of Current Law Faculty

Current statistics on law faculty guided the DLA selection process with regard to race and gender. Until 2009, the Association of American Law Schools (AALS) released basic demographic data on American law faculty, including race and gender statistics (See Table 2; also presented visually as Chart 1).<sup>65</sup> While these are not completely up to date, no more-recent disaggregated statistics were available to guide the DLA study at its inception.<sup>66</sup> It is especially unfortunate that current statistics have not been available because legal academia is currently in a state of flux, with severe admissions declines,<sup>67</sup> significant

<sup>65</sup> See 2008-2009 AALS Statistical Report on Law Faculty: Race and Ethnicity, *supra* note 12.

<sup>66</sup> While the American Bar Association (ABA) does release current statistics on lawyers by profession (including statistics on legal academics) it did not until 2015 disaggregate data by race/ethnicity and gender. Thus, at the inception of the DLA study, it was impossible to use ABA data to determine the number or percentages of women of color law faculty. For recent data, see *Total Female Staff & Faculty Members 2012-2013*, AM. BAR ASS'N., (2012-2013), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2012\\_2013\\_faculty\\_by\\_gender\\_ethnicity.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2012_2013_faculty_by_gender_ethnicity.authcheckdam.pdf).

<sup>67</sup> See BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 162 (2012); Luz E. Herrera, *Educating Main Street Lawyers*, 63 J. LEGAL EDUC. 189, 209 (2013); Philip G.

curricular changes expected and employed,<sup>68</sup> and budgetary constrictions affecting faculty hiring and firing.<sup>69</sup> Though faculty diversity may actually draw more prospective students in and keep current students in school, women of color, men of color, and white women tend to occupy the least secure positions on most law school campuses. Thus, the statistics on current law faculty do not fully reflect today's challenges. Still, with no superior data available, selection loosely tracked the AALS statistics with an oversampling of women of color to capture their full experience based on their importance to the intersectional lens employed, and additional oversampling of particular groups as necessary to include a robust set of perspectives.<sup>70</sup>

If one simply considers the numbers, significant gender and racial disparities remain in legal academia, with only 4,091 women legal academics (37%) and only 1,632 people of color (15%) out of 10,965 total. When considering the intersection of race and gender, the numeric inequalities are even more pronounced. Almost every racial/ethnic group has slightly more men than women, though the ratio of white men (5,090) to white women (2,741) is almost 2:1. Consolidating all women of color into one group, we see that there are only 772 women of color law faculty members, out of almost 11,000 total legal academics; thus, women of color represent just 7% of all law professors.<sup>71</sup> Of these 772 women of color law faculty members, African American women comprise the highest percentage, followed by Latinas and Asian/Pacific Islander women (APIs). Multiracial women, Native American women, and those from other non-white racial groups are only marginally represented in legal academia.

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Schrag, *Failing Law Schools—Brian Tamanaha's Misguided Missile*, 26 GEO. J. LEGAL ETHICS 387, 421 (2013).

<sup>68</sup> California has been a front-runner in this arena, with new requirements that law schools incorporate skills-based learning into the curriculum and that new attorneys complete mandatory pro bono work within a year of graduation. The California Bar Journal has been carefully following these developments. See, e.g., Laura Ernde, *Panel Outlines Plan to Amend Rules for Attorney Training*, CAL. BAR J. (Jan. 2014), available at <http://calbarjournal.com/January2014/TopHeadlines/TH4.aspx>.

<sup>69</sup> See, e.g., Jones & Smith, *supra* note 4.

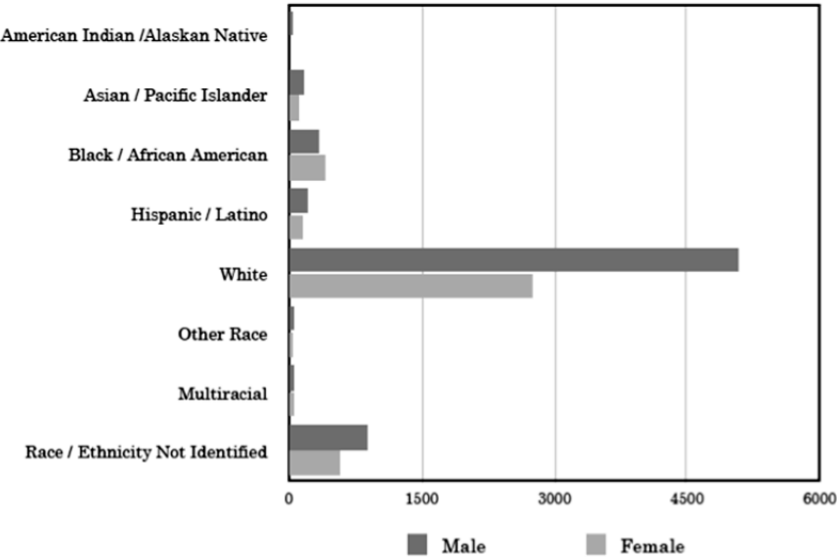
<sup>70</sup> For example, Native American women were especially oversampled; otherwise, as they comprise only .5% of legal academics, this population would have been empirically excluded from the sample.

<sup>71</sup> The numbers are likely much smaller when we consider tenured and tenure-track women, since we know that "as the status of a job within a law faculty goes down, the percentage of women holding that position goes up; women 'disproportionately fill non-tenure-track positions.'" Resnick, *supra* note 32, at 568 (quoting Deborah Merritt, *Are Women Stuck on the Academic Ladder? An Empirical Perspective*, 10 UCLA WOMEN'S L.J. 249, 250 (2000)).

TABLE 2. LAW FACULTY, BY RACE & GENDER, AALS 2009  
(N=10,965)

	Male	Female	TOTAL
American Indian/ Alaskan Native	30 (0.4%)	21 (0.5%)	51 (0.5%)
Asian/Pacific Islander	158 (2.3%)	112 (2.7%)	270 (2.5%)
Black/ African American	344 (5.0%)	409 (10.0%)	753 (6.9%)
Hispanic/Latino	199 (2.9%)	138 (3.4%)	337 (3.1%)
White	5090 (74.6%)	2741 (67.0%)	7831 (71.4%)
Other Race	67 (1.0%)	34 (0.8%)	101 (0.9%)
Multiracial	62 (0.9%)	58 (1.4%)	120 (1.1%)
Race/ Ethnicity Not Identified	869 (12.7%)	578 (14.1%)	1502 (13.7%)
TOTAL	6819 (100.0%)	4091 (100.0%)	10965 (100.0%)

GRAPH 1. LAW FACULTY BY RACE & GENDER, AALS 2009  
(N=10,965)



Both hiring and retention invoke significant challenges within legal academia. The 2005 AALS Committee on the Recruitment and Retention of Minority Law Teachers reported not only that the “hiring gap between white and non-white faculty actually *increased* between 1990 and 1997,”<sup>72</sup> but that there is a “widening ‘tenure gap’ between white faculty members and their colleagues of color,” with many faculty of color failing to achieve tenure within the time expected.<sup>73</sup> Understanding the qualitative experiences of law faculty, particularly women of color law faculty, is especially important since increasing positive encounters and interactions could yield greater retention rates for these faculty members and help diversify legal academia overall.

The primary purpose of this Article is to present and discuss various findings from the DLA study focused on relationships with faculty colleagues and interactions with students inside and outside of the classroom. Part II presents findings focused on these concerns, with regard to fellow faculty. Part III focuses on challenges from students in the classroom and elsewhere on campus. Part IV presents findings focused on solutions, with broader proposals discussed in the Conclusion. Though some of the survey data are presented in Tables, the DLA qualitative study findings are the principal focus of this Article.<sup>74</sup> Thus, the quantitative data are presented at the outset in order to frame the qualitative data that follows, which is the heart of the study and this Article.

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<sup>72</sup> Deo, *supra* note 2 (quoting AALS Committee Commentary, *The Racial Gap in the Promotion to Tenure of Law Professors: Report of the Committee on the Recruitment and Retention of Minority Law Teachers* 3 (2005)(“[b]oth the absolute number as well as the proportion of minority law professors hired decreased in 1996-97 from 1990-91.”) (on file with author)). For almost a decade, AALS publicized this report on their website at the following site: <http://www.aals.org/documents/racialgap.pdf>. Numerous recent articles continue to cite to it there. See, e.g., Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 WASH. U. L. REV. 763, 770 n.20 (2010); Russell G. Pearce et al., *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2410 n.14 (2015); Carmen G. González, *Women of Color in Legal Education: Challenging the Presumption of Incompetence*, FED. LAW, July 2014, at 49, 57 n.5, available at [http://www.upcolorado.com/excerpts/PresumedIncompetent\\_FederalLawyer.pdf](http://www.upcolorado.com/excerpts/PresumedIncompetent_FederalLawyer.pdf). Just as with removal of the statistical data on law faculty members, no explanation has been provided as to why this Report was removed or when it might be reinstated on the website. Its removal limits access to information regarding this important and controversial topic and prevents widespread dissemination of the valuable suggestions proposed in the Report.

<sup>73</sup> Deo, *supra* note 2.

<sup>74</sup> The samples of white men, white women, and men of color are especially small and therefore less reliable; they should be used primarily as points of contrast to the data on women of color law faculty.

## II. CHALLENGING RELATIONSHIPS WITH COLLEAGUES

*"If we had a meeting and we needed a note taker there would be the turning of all eyes to whichever female was in the room and she would become the note taker." -Abigail*

When aggregating DLA data on collegiality, it becomes clear that law faculty members report good relationships with colleagues overall, and frequent interactions with colleagues of different racial backgrounds. However, there is marked racial variation with regard to how faculty report on interactions with their colleagues and in terms of who is included in close-knit groups. For instance, white professors have the best relationships with other white professors, as 73% of white women and 75% of white men report "very friendly" interactions with their fellow white faculty (See Table 3). Although white faculty members report high levels of contact with colleagues from all racial backgrounds, the quality of those relationships varies depending on whose perspective we consider (See Table 4).

If we compare interactions between women of color and white faculty, the race and gender differences become clearer. Only 52% of Black women and 42% of Latinas in the sample report "very friendly" interactions with white faculty colleagues at their institutions. A full 24% of Black women law professors report "distant" relationships with white faculty. Interestingly, white faculty members do not see relationships with their female colleagues of color the same way. Instead, white faculty believe their relationships with faculty of color are much better than faculty of color view those same relationships. For example, Table 5 shows that in spite of one-quarter (24%) of Black female faculty characterizing their relationship with white faculty as "distant," no white male faculty and only one white female characterize relationships with African American colleagues similarly.<sup>75</sup>

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<sup>75</sup> Though not presented analytically, it is highly unlikely that this difference in perception is due to Black male faculty being especially friendly with white faculty. Of the four Black men in the DLA sample, one reports "very friendly" interactions with white colleagues and the other three characterize them as "sociable." This is not a statistically reliable sample size, but is offered here as merely an example.

TABLE 3. QUALITY OF INTERACTIONS WITH WHITE FACULTY, BY  
RACE & GENDER, DLA 2013 (N=92)

	Very Friendly	Sociable	Distant	Hostile	TOTAL
<b>Black Females</b>	11 (52.4%)	5 (23.8%)	5 (23.8%)	0 (0.0%)	21
<b>Asian/ Pacific Islander Females</b>	9 (60.0%)	5 (33.3%)	1 (6.7%)	0 (0.0%)	15
<b>Latinas</b>	5 (41.7%)	6 (50.0%)	1 (8.3%)	0 (0.0%)	12
<b>Native American Females</b>	3 (60.0%)	1 (20.0%)	0 (0.0%)	1 (20.0%)	5
<b>Middle Eastern Females</b>	0 (0.0%)	2 (100.0%)	0 (0.0%)	0 (0.0%)	2
<b>Multi- racial Females</b>	4 (57.1%)	3 (42.9%)	0 (0.0%)	0 (0.0%)	7
<b>White Males</b>	6 (75.0%)	2 (25.0%)	0 (0.0%)	0 (0.0%)	8
<b>White Females</b>	8 (72.7%)	3 (27.3%)	0 (0.0%)	0 (0.0%)	11
<b>Men of Color</b>	6 (54.5%)	4 (36.4%)	1 (9.1%)	0 (0.0%)	11
<b>TOTAL</b>	52	31	8	1	92



TABLE 4. FREQUENCY OF INTERACTIONS WITH WHITE FACULTY,  
BY RACE & GENDER, DLA 2013 (N=92)

	A Lot	Some	Not Much	TOTAL
<b>Black Females</b>	16 (76.2%)	4 (19.1%)	1 (4.7%)	21
<b>Asian/ Pacific Islander Females</b>	13 (86.7%)	2 (13.3%)	0 (0.0%)	15
<b>Latinas</b>	10 (83.3%)	2 (16.7%)	0 (0.0%)	12
<b>Native American Females</b>	4 (80.0%)	0 (0.0%)	1 (20.0%)	5
<b>Middle Eastern Females</b>	2 (100.0%)	0 (0.0%)	0 (0.0%)	2
<b>Multiracial Females</b>	6 (85.7%)	1 (14.3%)	0 (0.0%)	7
<b>White Males</b>	7 (87.5%)	1 (12.5%)	0 (0.0%)	8
<b>White Females</b>	11 (100.0%)	0 (0.0%)	0 (0.0%)	11
<b>Men of Color</b>	10 (90.9%)	1 (9.1%)	0 (0.0%)	11
<b>TOTAL</b>	79	11	2	92

TABLE 5. QUALITY OF INTERACTIONS WITH BLACK FACULTY, BY  
RACE & GENDER, DLA 2013 (N=91)

	Very Friendly	Sociable	Distant	Hostile	N/A	TOTAL
<b>Black Females</b>	14 (66.7%)	6 (28.6%)	1 (4.8%)	0 (0.0%)	0 (0.0%)	21
<b>Asian/ Pacific Islander Females</b>	12 (80.0%)	3 (20.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	15
<b>Latinas</b>	7 (58.3%)	5 (41.7%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	12
<b>Native American Females</b>	2 (40.0%)	1 (20.0%)	2 (40.0%)	0 (0.0%)	0 (0.0%)	5
<b>Middle Eastern Females</b>	1 (50.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (50.0%)	2
<b>Multi- racial Females</b>	6 (85.7%)	0 (0.0%)	1 (14.3%)	0 (0.0%)	0 (0.0%)	7
<b>White Males</b>	4 (57.1%)	3 (42.9%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	7
<b>White Females</b>	7 (63.6%)	3 (27.3%)	1 (9.1%)	0 (0.0%)	0 (0.0%)	11
<b>Men of Color</b>	9 (81.8%)	2 (18.2%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	11
<b>TOTAL</b>	62	23	5	0	1	91

While a number of faculty report positive interactions with colleagues, the qualitative data make clear that many female faculty of color see “cordial” relationships with white faculty as simply a mask of civility hiding friction; women of color law faculty are close primarily with other female faculty of color. Existing literature indicates that women of color often lack a sense of belonging when hired to teach at predominantly white and male-

normative law school campuses.<sup>76</sup> They often feel unwelcome in elite spaces that have traditionally excluded them, especially if no meaningful efforts are made to include them.<sup>77</sup> While the pleasant interactions may outnumber the hostile, the negative encounters tend to color the environment overall. In addition, many positive relationships are between women of color faculty, who enjoy especially friendly relations with others who share similar backgrounds, professional positions, or life experiences. Unfortunately, gender discrimination is especially salient from the data, both with regard to the invisibility and silencing of women as well as through blatant sexual harassment.<sup>78</sup>

### A. *The Mask of Collegiality*

*"The first semester everyone was very welcoming [but] it was just kind of like I was their guest [in their] home. I was new and exotic and different." -Laila*

Even in the qualitative data, most faculty report collegial interactions with colleagues. A Black female named Corinne notes that her law school is "a very civil place" where "we can really disagree," one day, "but then we can go out to lunch and hang out in someone's office the next day." Similarly, a white female named Abigail makes clear that her faculty "isn't full of cliques," but rather they "genuinely like each other and get together and are happy to see each other."

Corinne and Abigail are lucky to be so comfortable on their campuses. Unfortunately, many law schools are highly factionalized with different groups not getting along and often in direct opposition to one another. Because there are often blocs within law faculties that have very few women of color, these underrepresented individuals are frequently lost in the shuffle, becoming virtually invisible and silenced. For instance, a number of faculty agree with how Aisha, an Asian American law professor, describes her institution: "[T]he faculty at the law school is very polarized." Valeria, a Latina, sees something

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<sup>76</sup> Research regarding women in legal academia include the many articles cited *supra* Part I.A. and Resnick, *supra* note 32. However, most of these studies do not focus on race in addition to gender, and all could certainly be updated to reflect current trends and patterns from the past decade or more.

<sup>77</sup> See, e.g., Angel, *supra* note 59.

<sup>78</sup> It is beyond the scope of this Article to explore in detail whether individual female faculty have viable sexual harassment claims. Nevertheless, characterizations of their work environments and descriptions of the incidents women have endured seem to rise to the level of sexual harassment, as defined by the law and in the literature. See, e.g., Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2084-90 (2003) (providing a primer on workplace sexual harassment jurisprudence).

similar at her school and expects it is the norm, noting, “I think with every law school there are different factions.” In response to these tensions, Laura, a Native American, suggests that new law faculty “just avoid anybody who has negative karma [because] it’s not worth the time or effort to engage in a pointless discussion.” In this way, Laura disengages from her professional environment, determining that engaging is not worth the potential costs. Interestingly, the disengagement of underrepresented and disempowered law faculty parallels the alienation of law students of color, who face similar challenges during the three years of their law school careers.<sup>79</sup>

### 1. On Being a Guest

Most female faculty of color are reticent at best in their interactions with colleagues. For instance, a Black woman named Michelle says that at her law school she is “cordial with everybody,” though she “purposely, consciously” maintains only “very professional relationship[s],” rather than close ones. Similarly, an Asian American named Elaine, states, “There are a lot of people I’m friendly with, but I don’t have close friends on the faculty.” In fact, this hesitancy at becoming close to fellow faculty comes from a general distrust that many white female faculty and especially female faculty of color have toward their colleagues overall, especially their white male colleagues.

Much of this distrust and distance comes from women of color recognizing that some of their colleagues may be focused on their own best interests, rather than looking out for others. Some have witnessed white male colleagues actively working against the interests of women of color faculty. This goes against the sense of community that many faculty seek, and which they often find with others whom they see as allies or who share similar backgrounds both within and outside of their institutions.<sup>80</sup>

One of these frequently witnessed occurrences involves the negative treatment of junior women of color faculty, in comparison to the positive affirmations given to junior white male colleagues. For instance, an Asian American woman named Cindy recalls that when she first made a lateral move to her current institution, she “was treated like the dumb one, sort of [like an] ‘affirmative action hire’ in the worst sense of

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<sup>79</sup> See, e.g., Meera E. Deo et al., *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT’L BLACK L.J. 71 (2010).

<sup>80</sup> For more on community-building within institutions as well as with those outside of the institution, see Meera E. Deo, *Mentors, Sponsors, and Allies in Legal Academia* (work in progress) (on file with the author).

the word,” while a white male colleague who started at the same time was treated like he “was the ‘real’ [hire].” That open display of favoritism affected her confidence initially; even she “felt like he was the real deal and I’m not,” though “as it turned out it was kind of opposite,” with Cindy earning tenure and becoming widely respected while her white male colleague did not achieve similar success.

Leanne, an Asian American law faculty member, notes the significant difference in “the support given particularly to young male professors” as compared to other junior scholars; this leads many of the junior white women and women of color to distrust their more senior colleagues who display this blatant favoritism. She provides a poignant example of a white male junior colleague “who went up early for promotion and tenure” with the support of many senior colleagues, while the two women who were hired the same year as he was were discouraged from applying early even though, when compared to “the golden guy,” they published at roughly equivalent rates. Leanne was similarly discouraged from applying for promotion by her Associate Dean for Faculty Development, the person tasked with helping faculty grow and advance. He told Leanne initially that she “needed to wait another year or two” before applying, although she feels “it’s ridiculous how long I’ve been waiting.” Now, that same senior administrator “keeps saying, ‘Oh you’re golden. You’re totally a cinch. Don’t worry about it.’ And I’m like, ‘Really? Because you worked really hard to tell me not to go up. You explicitly said I should not go up.’” Thus, in Leanne’s experience, even the senior administrator tasked with advancing the careers of the faculty cannot be fully trusted when it comes to the professional development of junior female faculty of color.

In fact, the theme of receiving poor advice from senior colleagues is another common one throughout the DLA data. A Black senior scholar named Brianna warns her junior female faculty colleagues against following the counsel they receive from senior colleagues, especially when it does not seem logical or consistent with what they say to others. She notes specifically that she tells young female faculty of color, “Don’t listen to any stupid advice about people telling you that you can take it easy [your first year]. You can’t take it easy.”<sup>81</sup>

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<sup>81</sup> In fact, when asked to provide advice for junior scholars, most senior scholars of color in the DLA study suggest that publishing prolifically from their very first year is a requirement especially for female faculty of color, fully expecting they may be judged with harsher standards and against higher expectations than white junior faculty.

Martha, a Latina, also makes clear the rationale for her arms-length relationships with faculty, stating that she tries “to keep things cordial and superficial,” but goes no further because “I have a hard time really trusting other faculty.” Martha has seen first-hand how some white faculty members utilize a mask of collegiality to hide the true negativity they feel toward faculty of color. In Martha’s many years of experience, her colleagues will not “tell you to your face that they don’t agree with what you said at the faculty meeting, or [say,] ‘I think your perspective on this is wrong or harsh.’” Instead of engaging in honest and face-to-face conversation about why they disagree, Martha notes how “they go around your back and say that to each other. And then label you as mean [or] unkind.” This labeling, and the “gossip and bad talk behind your back undermines your voice in a very significant way.” Now, she cannot simply speak her mind and engage in fruitful conversation with her colleagues about particular issues, topics, ideas, or suggestions she may have; instead, she has to “corral the right people at the table, get them to say the right things, get them to agree” in advance and pledge to back her up, or her voice will be ignored. She believes that her past attempts at “just saying what I think is the truth or what needs to be said” has led to her being “undercut [by] people who talk about you behind your back.” After experiencing this environment for years, Martha protects herself by either disengaging or strategically ensuring that she has the requisite support in advance.

Many women of color have similar experiences with colleagues, leading to the current distrust that characterizes faculty relationships. Alicia, a Latina, also says that it is common at her institution for her white faculty colleagues to act friendly towards the faculty of color to their faces, but “behind closed doors” there is the “[d]enigration of the person’s work, their scholarship or their teaching.” In fact, the existing literature suggests that Critical Race Theory, feminist legal scholarship, and other social justice-oriented research is often devalued by many faculty colleagues at legal institutions, though many women and people of color gravitate toward that work as central to and validating of their own experiences.<sup>82</sup> Alicia recounts recent conversations where “several people came to my office and said, ‘Did you know that so and so goes around speaking ill of X?’ and then they said, ‘And so and so is

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<sup>82</sup> Tara J. Yosso, *Whose Culture has Capital? A Critical Race Theory Discussion of Community Cultural Wealth*, 8 RACE ETHNICITY & ED. 69 (2005).

also speaking ill of Y and Z.” It turns out that “X,” “Y,” and “Z” are all people of color whom Alicia’s colleagues did not support for promotion. Alicia notes that “there were two African Americans and one Latina who were up [for promotion]. All three of them were targeted.” While she did her best to protect them, this produced great anxiety for Alicia even though she herself was already tenured. In fact, perhaps because she was already tenured, she felt the need to do whatever she could to protect those being bad-mouthed by her colleagues, although she did not know how best to proceed. She “didn’t know which one was going to survive [the character assassination attempts] because . . . it’s random at some level. Everybody has weaknesses. Everybody has strengths.” She saw her colleagues as playing on particular stereotypes about people of color to target those applying for promotion, but agonized over how best to tailor her response and even over whether one would be productive; she wondered, “When is the subtle stoking of the stereotypes going to succeed and when is it not? I can’t always predict.”

For Laila, a Middle Eastern woman, distrust of her colleagues stems from the troubling shift in climate soon after she started her tenure-track position. While her initial reception as a “guest” may have been based on her “exotic” racial background, things got worse by the second semester:

The first semester everyone was very welcoming [but] it was just kind of like I was their guest [in their] home. I was new and exotic and different and I was, you know, energetic and they thought, “That’s so neat!” “This new person!” Sort of fresh blood. Then second semester I think jealousy sort of set in and I really sensed it. I got to the point [where] I didn’t even want anyone to know what I had accomplished because . . . instead of being complimented it was like you would get these very negative looks.

Laila’s initial reception as a “guest” as a woman of color faculty member on a predominantly white campus is not unusual. In fact, some have felt their unusual presence or interloper status was more akin to an “intruder” than a guest. For example, one contributor to *Presumed Incompetent* writes of a common feature of most law schools today: the lobby wall with numerous portraits of “dead white males and some living ones” memorializing famous and respected former faculty members, alumni, and donors to the school;<sup>83</sup> she feared these sentries noted her entry as a faculty member when she first began law

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<sup>83</sup> Adrien Katherine Wing, *Lessons from a Portrait: Keep Calm and Carry On*, in *PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA*, *supra* note 25, at 356, 359-60.

teaching and she could virtually hear them silently “screaming—intruder alert.”<sup>84</sup>

## 2. Birds of a Feather

In addition to the general sense of distrust and resulting preference for distance from most faculty, it is also common for women of color to seek out for closer relationships those colleagues who come from similar backgrounds, share similar professional experiences, or may otherwise have similar world-views. Valeria, a Latina law professor, is closest to the other junior faculty at her law school, though even those relationships are not especially close; she notes that they “do things outside the office every now and again, so it’s very collegial.” Vijay, an Asian American male, says that he and his fellow junior colleagues “talk a lot about issues: faculty governance issues, difficult votes, how things are going in the classroom, we socialize together, we are just a good group.” In this way, junior faculty often stick together, perhaps recognizing their unity through a shared lack of job security and other ways in which their professional position bonds them together.

Vivian, an Asian American law professor, is picky about her professional relationships, specifying, “I do have very strong relationships with particular colleagues.” Erin, a Native American woman, similarly notes that she has “some good friends” and sees her law school as “a really wonderful environment.”<sup>85</sup> She is “particularly close to my African American male colleague and my [white] lesbian colleague because sometimes I just think that they get things better than colleagues who are not necessarily from those backgrounds.” Here, Erin alludes to her shared experience with colleagues who come from backgrounds that have been traditionally un(der)-represented in legal academia and marginalized in society generally, noting that their shared perspective or world view may help them relate to Erin’s experiences as a female Native American law professor.

A number of female faculty of color agree with the sentiment that Annalisa, an Asian American, expresses about

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<sup>84</sup> *Id.* While the challenges associated with faculty hiring are not discussed in depth in this Article, they are worthy of further study as a barrier to entry for faculty of color. Preliminary analyses of DLA data do show that institutional bias may thwart diversity in legal academia. Deo, *Trajectory of a Law Professor*, *supra* note 11.

<sup>85</sup> This is especially wonderful for Erin given the horrific experiences she endured as a female faculty of color in her first tenure-track position at a different law school. See *infra*, Part II.B.2.



the ways in which her female faculty of color colleagues provided her with the support necessary to sustain her through various professional challenges; she says, "I was able to survive because I had a core group of professors who were my friends, and we challenged each other's work and also provided moral support." Grace, a multiracial woman, provides specifics. She recounts a time when her Dean was providing summer funding for faculty to "develop these innovative ways of teaching, and one of the Associate Deans said to me, 'I told the Dean not to give you that [money because you] would do it anyway, so we don't need to pay you to do it because you'll do it anyway.'" Her Associate Dean was correct that Grace's strong investment in the school meant that she would do the work even without the monetary incentive; however, his candid interest in taking advantage of her commitment made Grace go "crazy with that whole assumption [that he] thought that was an appropriate way to think about creating incentives for faculty." She did not take it up directly with the Associate Dean, who is white, but called two colleagues "who are both people of color, both women, to talk through [it,]" and they both "totally [were able to] understand" her disappointment and disillusionment. She makes her first calls after these sorts of incidents to colleagues she trusts both "to make sure that the way I'm reacting is appropriate" and also "to figure out strategies for how to respond and what to do." Because she ultimately got summer funding that year, she decided to not pursue the matter further, but "it still pisses me off." Imani, a Black female, agrees, stating, "I would say my closest relationships are with the female faculty, particularly the three or four female faculty of color that we have." Thus, while faculty are cordial with one another, this civility masks underlying distrust and distance. Of notable exception are the close relationships female faculty of color have with one another and other underrepresented and often marginalized faculty members at their institutions whom they draw on for support.<sup>86</sup>

### *B. Invisibility/Silencing and Sexual Harassment*

*"I've counted over 10 times on my faculty where I've said something and [nobody has responded; then] a male faculty has repeated it and another male colleague has said, 'Good idea!'" -Carla*

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<sup>86</sup> Meera E. Deo, *Sources of Support for Legal Academics* (work in progress) (on file with author).

The experiences of a number of female faculty participants in DLA reveal that gender discrimination continues to be a serious problem in legal academia. In fact, the white- and male-normative law school environment has been studied in both the student and faculty context. As students, “[w]hite males are the primary focus of classroom attention,”<sup>87</sup> often at the expense of women of color, men of color, and white women. Women students tend to be “called on less frequently than men,” and their comments are often met with skepticism or sometimes ignored outright.<sup>88</sup>

The law faculty experience is quite similar, as documented in the existing literature. White women faculty and especially women of color professors rarely “enjoy the status, authority, and opportunity equal to that of white men working in the legal academy.”<sup>89</sup> There are ongoing racial and gender “disparities in terms of pay, tenure denials, and employment at the most elite law schools, in addition to double standards in assessing identical credentials.”<sup>90</sup> Likely because of this bias, women of color—who are viewed by others and often consider themselves to be “outsiders” in the white male culture of legal academia—have lower retention rates than white men.<sup>91</sup>

The DLA data confirms and elaborates on these past studies, specifically documenting ongoing gender concerns relating to invisibility/silencing and outright sexual harassment.<sup>92</sup> In fact, the importance of relationships forged with those similarly situated—especially friendships between female faculty of color—seem to parallel the ways in which law students of color rely on their peers and the broad supportive structures within student organizations that provide them with social, cultural, and emotional support to sustain them.<sup>93</sup>

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<sup>87</sup> Deo, *supra* note 19, at 78 (quoting Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL’Y 11, 27 (2003)).

<sup>88</sup> Resnick, *supra* note 32, at 570 (citing Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1299-1300 (1988)).

<sup>89</sup> Resnick, *supra* note 32, at 564.

<sup>90</sup> Barnes & Mertz, *supra* note 6, at 512.

<sup>91</sup> *Id.*

<sup>92</sup> This Article neither defines the standards for a formal sexual harassment claim nor asserts that participants in the DLA study have formal legal grounds for a suit. The term is used broadly to refer to extreme gender-based exclusion and work conditions that provide challenges for women to succeed.

<sup>93</sup> For more on peer mentorship and organizational mentorship for law students of color, see Deo & Griffin, *supra* note 8, at 311 (“[M]entorship is also positively associated with the mentee’s likelihood of retention.”).

## 1. Mansplaining and Whitesplaining

As an example of the male-centered workplace, a Black woman named Imani notes the numerous “times where I felt like some of the male colleagues look at themselves as above others and [are] not always respectful of others’ contributions.” Trisha, a Black female, blames these tensions for her current “extremely marginalized” position among her colleagues. In fact, the invisibility of women and especially women of color is stark. As a contributor to *Presumed Incompetent* notes of her first appointment as a legal academic, “I can recall being almost invisible . . . I seemed not to exist” to the other faculty members.<sup>94</sup> Many female faculty of color who participated in the DLA study shared similar experiences. Jennifer, a Native American, embodies this invisibility, in spite of her good-humored response to it:

[In] the four and half years I’ve been here there’s a couple of people I haven’t even had a conversation with. And they don’t look at me. They don’t acknowledge me. They don’t seem to know who I am [laughing]. [They] just treat me like a non-entity.<sup>95</sup>

Elaine, an Asian American senior member of her law school faculty, echoes Jennifer’s remarks, noting that she has one faculty colleague “who really has never acknowledged my presence.”

Male domination is most prominent during faculty meetings at many institutions, where silencing is especially pronounced. As a Native American woman named Melissa notes, “There is that silencing that goes on in our faculty meetings.” She describes what she considers an affirming, almost welcoming “hazing” ritual for her junior white male colleagues that was never offered to her and the other women, “where junior white males . . . get coddled, get laughed at, get remarks made, get floor time, get affirmations, and the women don’t ever.” This is one way in which the male-dominant culture of law school is reproduced and perpetuated.

Both inside and outside the workplace, a woman’s ideas, suggestions, or observations may be ignored until a man explains (or more frequently, simply repeats) her thoughts; sometimes the man honestly believes himself to be the one full

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<sup>94</sup> Ruth Gordon, *On Community in the Midst of Hierarchy (and Hierarchy in the Midst of Community)*, in *PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA*, *supra* note 25, at 313, 327.

<sup>95</sup> Jennifer repeats this experience laughingly, and notes her overall experience as positive; though there are a number of objectively problematic encounters in her narrative, she has chosen to respond to them with humor and also copes by seeking escape with large swaths of time spent with her tribe.

of knowledge and ideas, virtually unaware of the woman's comments before voicing them as his own. This common occurrence, outside of legal academia as well as within, falls into the "archipelago of arrogance"<sup>96</sup> referred to as "mansplaining."<sup>97</sup> Mansplaining is an occurrence that many women readily recognize from their own experience of "having their expertise instantly dismissed because of the lady-shaped package it came in."<sup>98</sup> Mansplaining occurs at "the intersection between overconfidence and cluelessness," where some men repeat what women have already stated, claiming those statements as their own, and others accept and applaud, giving credit to the man who repeated the words rather than the woman who created them.<sup>99</sup> Rebecca Solnit, the author who pioneered the ongoing public debate over mansplaining (if not the term itself), shares that when men take it upon themselves to interpret for women or explain to women, they assume that a woman is simply "an empty vessel to be filled with their wisdom and knowledge," forgetting that women may even know more than the man himself on a particular topic.<sup>100</sup> Thus, before women can even provide arguments to support their worthy ideas, they must first fight "simply for the right to speak, to have ideas, to be acknowledged to be in possession of facts and truth, to have value, to be a human being."<sup>101</sup> The many challenges associated with being heard, regardless of what is being said, "keeps women from speaking up and from being heard when they dare [or] crushes young women into silence by indicating . . . that this is not their world."<sup>102</sup>

Mansplaining is sadly alive and well in legal academia, where many women receive the signal that they are unwelcome or do not belong, and so should know their place and remain silent.<sup>103</sup> As an example, a Latina named Carla notes, "I've

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<sup>96</sup> Rebecca Solnit, *Tomgram: Rebecca Solnit, The Archipelago of Arrogance*, TOMDISPATCH.COM (Apr. 13, 2008, 6:14 AM), <http://www.tomdispatch.com/post/174918>.

<sup>97</sup> See, e.g., Jessica Valenti, *Mansplaining, Explained: 'Just Ask an Expert. Who is Not a Lady'*, GUARDIAN (June 6, 2014, 7:18 AM), <http://www.theguardian.com/commentisfree/2014/jun/06/mansplaining-explained-expert-women>.

<sup>98</sup> Helen Lewis, *The Essay that Launched the Term "Mansplaining,"* NEW REPUBLIC (July 4, 2014), <http://www.newrepublic.com/article/118555/rebecca-solnits-men-explain-things-me-scourge-mansplaining>.

<sup>99</sup> Rebecca Solnit, *Why Mansplaining is Still a Problem*, ALTERNET.COM (Aug. 12, 2012), <http://www.alternet.org/why-mansplaining-still-problem>.

<sup>100</sup> Solnit, *supra* note 96.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> In fact, it seems prevalent throughout academia generally, given that there is a website dedicated to academic mansplaining, *Academic Men Explain Things To Me, Where Women Recount Their Experiences of Being Mansplained*, in *Academia and Elsewhere*, <http://mansplained.tumblr.com> (last visited Feb. 2, 2015).

counted over 10 times on my faculty where I've said something and [nobody has responded; then] a male faculty has repeated it and another male colleague has said, 'Good idea!'" Again, this provides weight, acknowledgment, and appreciation for men while devaluing women.<sup>104</sup> Elaine, an Asian American, has had a very similar experience at her institution. She recalls, "I went through the stages of saying things at a faculty meeting and no one paid attention to it and then a man would say it and then everyone would pay attention to it." In this way, once a man explained and validated Elaine's remarks, others noted and appreciated them—albeit mistaking them for being first articulated by a male faculty member rather than by Elaine.

Combining the intersectional framework with the concept of mansplaining, we can consider how "*whitesplaining*" may also be relevant in legal academia. Smita, an Asian American, gets the sense that what she says "would carry more weight with the faculty if it were being said by white people." This is true whether she talks "about the importance of diversity or whatever else. We don't hear it enough from my white colleagues, even those who consider themselves progressive. So there is a sense of your voice being discounted in a lot of respects." Thus, white validation of Smita's suggestions or observations would give them more weight than when Smita makes them on her own. For women of color the invisibility/silencing and discrimination may be doubly and even cumulatively challenging—mansplaining multiplied by whitesplaining—because it is based on both race and gender.<sup>105</sup>

Surprisingly, many gender disparities in legal academia, especially the devaluing of women, are particularly notable when compared to women's experiences in corporate law practice.<sup>106</sup> Many women participants in the DLA study specifically note that they did not experience such pronounced gender discrimination in legal practice, even when working at elite law firms.<sup>107</sup> Camila, a Latina scholar, says her "biggest

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<sup>104</sup> See, e.g., Resnick, *supra* note 32, at 570-71.

<sup>105</sup> For more on how intersectionality creates not only additive but cumulative effects, see Delgado & Stefancic, *supra* note 29.

<sup>106</sup> In terms of numeric representation, diversity in law firms at the associate level is slightly better though similar to that of legal academia with roughly 11% women of color, 10% men of color, and 33% white women. Yet, representation at the partnership level leaves a lot to be desired with only 2% women of color, 5% men of color, and 18% white women. *Perspectives on Diversity*, NALP BULLETIN (June 2014), <http://www.nalp.org/0614research>.

<sup>107</sup> The corporate law firm realm has its own issues with gender discrimination. Some DLA participants reflect on those issues as well. For instance, Abigail notes, "I worked for the largest law firm in the city at the time and was one of just a few females. One of the litigation partners downtown told me that 'litigation is

challenge” in law teaching involved the cultural transition from being respected in legal practice to being virtually ignored by her colleagues in legal academia; this involved, “going from a place where I felt that my opinion was valued, work was valued, partners listened to me with respect,” to being at an institution where her colleagues “don’t want to hear what you say, people talk over you in faculty meetings, . . . or make faces while you’re talking.” She notes that “this kind of incredibly immature behavior” is gender-based, targeted specifically at the women by the men on her faculty.

Zahra, a Middle Eastern woman, recalls a meeting about faculty hiring where women voiced gender concerns that others pretended to care about, but ultimately ignored:

[S]everal of us junior colleagues were concerned about how a new [potential] hire was going to interact with women, and specifically we had heard complaints that he doesn’t work well with women. There were, you know, four of us [women] that expressed things in the appointments committee meeting, saying, “Look, we are concerned about this,” and some of the male colleagues acted like they cared; they said, “Well, you know, that sounds disappointing and we wouldn’t want that,” but everyone voted for him anyway [aside from the four of us women and two male junior colleagues].

That candidate was ultimately hired and will be starting at Zahra’s law school shortly. While she is approaching her new colleague with an open mind, she learned something about her existing colleagues because of the incident, noting that “it was just surprising that . . . we made our worries known, but [were] ignored. No one cared.” This speaks not only to gender bias but also the prevalence of expressing a “surface” interest in diversifying without recognizing this goal as a “core” priority, and thereby failing to act in a manner representing a true commitment to diversity.<sup>108</sup> Abigail, a senior white legal scholar, remembers that in the early days of her career in legal academia, adherence to traditional gender roles was expected. Women were clearly meant to take on subservient, silent roles. As an example, she recalls the following: “If we had a meeting and we needed a note taker there would be the turning of all

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like war, honey, and you just don’t send women into combat.” See also Lisa van der Pool, *Big Law Firms Wrestle with Gender Discrimination Suits*, BOS. BUS. J. (Feb. 15, 2013, 6:00 AM), <http://www.bizjournals.com/boston/print-edition/2013/02/15/big-law-firms-wrestle-with-gender.html?page=all>. This Article does not attempt to minimize the concerns of women working in corporate law firms; rather, it simply points out that some women participants in DLA recognize that gender discrimination may be even more pronounced in legal academia.

<sup>108</sup> Rebecca K. Lee, *Core Diversity*, 19 TEMP. POL. & CIV. RTS. L. REV. 477, 479-80 (2010) (discussing “surface” versus “core” diversity ideals in the workplace).

eyes to whichever female was in the room and she would become the note taker.” Some of these expectations continue today; as a white woman named Ava notes, “[S]ome of the senior colleagues in the building . . . treat me as a ‘gal’ and not as an intellectual equal.”

## 2. Causes of the Clyde Ferguson Syndrome

In fact, though many senior women recall the gender challenges pervasive through the early days of their teaching careers, even those who entered legal academia in more recent years have faced what could readily be described as a hostile work environment.<sup>109</sup> Ava, a white woman who entered legal academia about 15 years ago, recounted how her law school Dean “hit on me.” Ava’s Dean (who had recently divorced) invited Ava to what she thought was a professional lunch; he then professed his feelings for her:

He asked if I was dating anybody. He made this big point of saying, “I hope you know it wouldn’t be appropriate to date because I’m your boss, but I find you really attractive and awesome. And if I could I would really be interested in dating you.”

Ava’s response at the time was characteristic of young professional women in her situation: “[I]t made me really uncomfortable and I was shocked, because he was my boss, that he would make it clear he was interested in me romantically.” This incident occurred before Ava earned tenure (which happened after this particular Dean left her institution).

Similarly, a white woman named Isabella recalls an incident that occurred soon after she joined legal academia a decade ago at an institution that she has since left: “One of my first faculty meetings there I spoke out on an issue and didn’t realize women were meant to be seen and not heard.” She remembers that one of her white male colleagues approached her afterward to say, “Wow! You’re really articulate!” And that stunned me because I thought all of us on the law faculty would be articulate, but it really took this faculty member aback” that a woman had spoken up and spoken so well. Reflecting on the experience today, Isabella acknowledges, “There were some real serious gender issues while I was there.”

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<sup>109</sup> Again, this Article does not seek to outline strategies for filing formal sexual harassment claims against institutions based on a hostile workplace, though further research should be done to determine whether these common experiences are actionable.

A Latina law professor named Lola recounts a challenging time professionally for her, when she was denied promotion at her school. Though she suffered greatly, she says that “no one at school knew the pain and the betrayal I was feeling and that was incredibly exhausting to come to work every day and pretend like nothing was wrong.” She relied on family and friends “for that relief of the stress and disappointment and all of that.” She did not share her disillusionment with her faculty colleagues because “[a]t work . . . I have relationships, but again I don’t fully trust people here.”

When a Black law professor named Patrice was asked about the tenure process she had recently gone through, she replied, “Oh my god. [Sigh.] I have post-traumatic stress disorder.” In part, she faced a challenge common to many scholars of color and others who are underrepresented in the legal academy and choose to focus on identity issues dear to them personally as part of their scholarship. As Patrice recounts it, “we have these white guys on the faculty who are really not . . . they’re hostile to race work.” She knew their perspective even before she applied for tenure and contemplated how that might affect her work, thinking it “was tricky because I wanted to be able to do the work I wanted to do but I also wanted tenure, right?” One coping mechanism she employed was not to share her work with her colleagues, though Patrice is at an institution where it is common for junior faculty to give regular talks to the full faculty. In general, the frequent presentations of scholarship in a nascent stage are beneficial to the presenter; as Patrice puts it, “[I]n this setting the critiques are constructive to help you get to the next point.” Yet, because her scholarship included issues of race and ethnicity, some of her white male colleagues were not constructive, but instead the purpose of their “critiques [was] to shut it down and steer you in a different direction.” So she made a calculated decision to disengage, to not present her work to the faculty. Though Patrice lost the benefit of potentially constructive feedback from some colleagues, she kept her sanity throughout her junior faculty years. She notes that as “an effort to be true to myself and just to sleep at night I felt like I had to just do it, [avoid presenting,] stay in my head with it which is also just very difficult and not particularly fulfilling as a place to be as an academic.”

Patrice is one of the many DLA participants who admitted to serious health effects resulting from pursuing a career as a law professor. For instance, a Native American woman named



Melissa notes, "I find myself missing more days from illness and being a lot more stressed with no breaks." In fact, the most frequent comment along these lines echoes Patrice's admission that she felt she had PTSD.<sup>110</sup> Existing scholarship has shown that many marginalized women of color faculty members enduring all manner of challenging situations believe that remaining silent is "the key to [their] survival in academia."<sup>111</sup> Many make the calculated decision not to speak out or find other coping mechanisms that allow them to function professionally. However, this self-censorship and self-silencing, the tendency to "bite your tongue and make no sound when you want to speak," can itself exert a significant emotional toll.<sup>112</sup> In fact, some scholars have tied the emotional challenges facing traditional outsiders in legal academia with ill-health and even untimely death; this has been termed "the Clyde Ferguson Syndrome" after the early passing of the revered Harvard Law School professor, a Black man who endured great challenges professionally that many believe affected his health significantly.<sup>113</sup>

Carla, a Latina law professor, may currently be enduring the Clyde Ferguson Syndrome herself. For years she has been putting into practice a professional strategy that she adopted after watching the relative downfall of a senior woman of color colleague. Recently, Carla "was supposed to be on research leave," but found out just weeks before that it was being rescinded. As she tells it, "[M]y Academic Dean called me and said, 'You can't go on research leave. You have to chair [a particular] committee.'" While some may have been flattered to be asked to be Chair of high profile committee, Carla saw the situation as a requirement that she continue institutional housekeeping, noting, "I've been in this long enough to know that's not really a compliment; that means someone needs to stay and clean the house [and] it's going to be you." In spite of

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<sup>110</sup> Bianca, a Latina, offers a useful strategy for combatting the challenges of being a woman of color law professor: "I balance the stresses of my job by being physically active."

<sup>111</sup> Angela Onwuachi-Willig, *Silence of the Lambs*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA, *supra* note 25, at 142, 148.

<sup>112</sup> Women of color in legal academia sometimes feel they are simply going through the motions, playing a part as an academic, but remaining disinvested from the job because they cannot be themselves. Instead, they endure "feel[ing] like a clown. You smile when you do not feel like smiling. You bite your tongue and make no sound when you want to speak." Angela Mae Kupenda, *Facing Down the Spooks*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA, *supra* note 25, at 20, 23.

<sup>113</sup> See, e.g., Roy L. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419 (1986).

being a senior faculty member, Carla did not feel she had the power to say no, to remind her Academic Dean that she had negotiated for her leave two and a half years prior. She admits that “it was really shocking, but I dealt with it by saying . . . Well I dealt with it with my ordinary strategy, which was to say, ‘Okay.’” The fact that Carla was shocked but immediately acquiesced sheds some light on the Clyde Ferguson Syndrome, the negative health effects of being stunned, disappointed, knowing you are the victim of injustice, and yet remaining silent. Imagine the long-term consequences of this cycle repeating itself year after year. Carla herself has done this. She recounts the many ways in which she has worked to accommodate whatever requirements her institution imposes on her: “If someone said, ‘Do this,’ I did that. If someone said, ‘Teach that,’ I taught that. If someone said, ‘You’ll teach [at] 8 a.m.,’ I taught at 8 a.m. If someone said, ‘You teach summer school,’ I taught summer school.” One might expect that at some point Carla would resist, that she would either directly or even somewhat passively attempt to get out of these impositions. But she never felt she had the option of saying no or even hesitating before saying yes. She explains, “I didn’t feel that I had [a choice] or wanted to risk saying no because then the gossip would start up: ‘She’s difficult,’ ‘She’s not a team player.’” In fact, Carla had seen this exact pattern with the only other woman of color on her faculty, whom Carla says is “very, very well-credentialed,” yet because she “said no early on [she] got pegged as not a team player.” There were serious professional repercussions for Carla’s colleague, which Carla interprets as “the price of saying no.” After witnessing her colleague’s trajectory, Carla explains that she “felt that I had to [say yes to] survive. I had to take in these requests and produce quality work.” Her strategy has paid off professionally: Carla is well respected and certainly holds the badge of a team player. Yet, the personal emotional costs have been high. She notes that in a recent year she made a startling and disturbing realization: “I felt like I had PTSD.”

Erin, a Native American, recalls other more egregious gender-based violations at her former law school workplace. She remembers some of her senior male colleagues “coming into the office and petting my hair, and telling me what beautiful hair I have, telling me I have large luscious breasts.” There was a clear power imbalance, based on race, gender, and institutional status, among other things. Erin’s intersectional experience of embodying so many devalued characteristics

clearly worked against her as a young, untenured, woman of color. Because the perpetrators were white “senior tenured members” and she was a woman of color and a “junior faculty member, you just don’t want to rock the boat, so you don’t say anything—at least I didn’t say anything. And you regret it later and you carry that guilt.” Erin admits that she has accumulated negative health effects from these incidents. The emotional toll of coping with that hostile workplace environment haunts Erin even today, though she quickly left her previous law faculty; she notes, “I actually have PTSD syndrome because of the amount of stress. I still have nightmares on a regular basis even though I’m very happy at my current institution.” This overt gender discrimination, while not at every institution, is still a recurring theme in the experiences of women in legal academia.<sup>114</sup>

### C. Comparison & Contrast

*“I have good relationships with everybody. I don’t think there are cliques here. People, like, respect and are nice to each other. I don’t think there’s any kind of feeling that I can’t say [something] because it wouldn’t be politically correct or [would] offend somebody.” -Joe*

The experiences of white men provide a significant contrast to the experiences of their female and faculty of color colleagues with regard to faculty interactions. For instance, when a white man named Matt was asked in the DLA interview about his relationships with fellow faculty, he responded in a way that is representative of the other white men in the DLA sample: “I really enjoy my colleagues. There’s a lot of collegiality among young faculty, older faculty. It’s a nice place to be.” While Matt admits that he generally dislikes the inefficiency of large meetings, his “overwhelming thought when I go [into faculty meetings] is, ‘I really like these people.’” He and the other white men in the sample do not mention stress based on sexual harassment or experiences of silencing from colleagues, as so many of their female colleagues do. A white man named Christopher is “very close” especially with people who were hired around the same time as he was, including “five couples who socialized together and vacationed together and sort of did everything together” for many years. Ian, another white male law professor, recognizes that there is

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<sup>114</sup> While there are challenging incidents in legal academia that are based primarily on race, they seem less overt and less frequent than gender-based or race-and-gender based incidents. There are, however, egregious racial violations with regard to discrimination in law faculty hiring, explored further in Deo, *supra* note 80.

a “broad diversity of views” on his faculty, but believes there is “a feeling of mutual respect” among his colleagues. While he has “good relationships with everyone,” he also is especially close with “several of my colleagues,” meeting them for “dinner parties [and other events] outside the law school.” An even larger group meets frequently for “drinks or having picnics or other events together.”

Most significantly, very few white male faculty members note confrontational or complicated relationships with colleagues. Recall again that white faculty note positive relationships not only with other white colleagues, but with those from all racial backgrounds; however, those feelings are not always reciprocated since faculty of color characterize these same relationships as less friendly.<sup>115</sup> In other words, white faculty and faculty of color perceive the same interactions differently. Take, for instance, a white male named Joe who insists that he has “good relationships with everybody.” Though he is especially close to those who research and teach in his field, he thinks nobody “would describe us as a clique” in part because he believes “[t]here aren’t any factions” at his law school. Interestingly, he insists both that all faculty members “respect and are nice to each other,” and that he is comfortable expressing his views, whatever they may be, since there is no institutional norm of self-regulation even when saying something that “wouldn’t be politically correct or [might] offend somebody.” Note that Joe’s female faculty of color colleagues might see his comments as politically incorrect or offensive, though he feels comfortable speaking his mind.

Where white male faculty may see many positives, white female faculty and especially female faculty of color perceive the white male climate pervading the culture of the law school, and recognize it as one that excludes them.<sup>116</sup> A white male named John’s experience is typical; he notes of his relationships with faculty colleagues, “I don’t have any particular challenges in terms of getting along.” Of course, if we asked John’s white female and female faculty of color colleagues to characterize their relationships with him and others, they might not see these interactions as he does.

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<sup>115</sup> See *supra* Part II.A. for more on how different faculty view the same relationships differently.

<sup>116</sup> See, e.g., Angel, *supra* note 59.

### III. CONFRONTATIONAL INTERACTIONS WITH STUDENTS

*"The [white] guys with their baseball caps on backwards . . . are challenging just everything you are saying. [Y]ou try not to follow them down that road and try and maintain control of the class and just teach the class, and there they are, like the gnat just driving you crazy." -Patrice*

Faculty relationships with students are both incredibly wonderful and impossibly trying. DLA data show that individual faculty members who very much enjoy close and nurturing relationships with some students often have especially fraught relationships with others. This Part discusses the quality of student-faculty interactions, as well as their frequency.

In addition, as would be expected, the vast majority of faculty report "a lot" of interaction with white students (See Table 6). In fact, female law faculty of color from various racial/ethnic backgrounds have about equal levels of interaction with white students as do white men, white women, and men of color (See Table 6).

TABLE 6. FREQUENCY OF INTERACTIONS WITH WHITE STUDENTS,  
BY RACE & GENDER, DLA 2013 (N=92)

	A Lot	Some	Not Much	TOTAL
<b>Black Females</b>	15 (71.4%)	6 (28.6%)	0 (0.0%)	21
<b>Asian/Pacific Islander Females</b>	14 (93.3%)	1 (6.7%)	0 (0.0%)	15
<b>Latinas</b>	8 (66.7%)	3 (25.0%)	1 (8.3%)	12
<b>Native American Females</b>	4 (80.0%)	0 (0.0%)	1 (20.0%)	5
<b>Middle Eastern Females</b>	2 (100.0%)	0 (0.0%)	0 (0.0%)	2
<b>Multiracial Females</b>	7 (100.0%)	0 (0.0%)	0 (0.0%)	7
<b>White Males</b>	7 (87.5%)	1 (12.5%)	0 (0.0%)	8
<b>White Females</b>	10 (90.95)	1 (9.1%)	0 (0.0%)	11
<b>Men of Color</b>	10 (90.9%)	1 (9.1%)	0 (0.0%)	11
<b>TOTAL</b>	62	7	2	92

Still, the quality of those interactions does differ by race/gender (See Table 7). For example, only 29% of Black women faculty members characterize their interactions with white students as “very friendly,” compared with 63% of white men, 73% of white women, and even 73% of men of color who enjoy “very friendly” relationships with white students. As a whole, women of color characterize their interactions with

white students significantly differently than all other faculty do. The only individual in the sample to characterize the quality of interactions with white students as “hostile” is a Black woman. No whites, neither male nor female, characterize their interactions as even “distant,” whereas small numbers of both women of color and men of color do.

TABLE 7. QUALITY OF INTERACTIONS WITH WHITE STUDENTS, BY RACE & GENDER, DLA 2013 (N=92)

	Very Friendly	Sociable	Distant	Hostile	TOTAL
Black Females	6 (28.6%)	12 (57.1%)	2 (9.5%)	1 (4.8%)	21
Asian/ Pacific Islander Females	11 (73.3%)	4 (26.7%)	0 (0.0%)	0 (0.0%)	15
Latinas	6 (50.0%)	5 (41.7%)	1 (8.35)	0 (0.0%)	12
Native American Females	2 (40.0%)	2 (40.0%)	1 (20.0%)	0 (0.0%)	5
Middle Eastern Females	0 (0.0%)	2 (100.0%)	0 (0.0%)	0 (0.0%)	2
Multi- racial Females	3 (42.9%)	3 (42.9%)	1 (14.3%)	0 (0.0%)	7
White Males	5 (62.5%)	3 (37.5%)	0 (0.0%)	0 (0.0%)	8
White Females	8 (72.7%)	3 (27.3%)	0 (0.0%)	0 (0.0%)	11
Men of Color	8 (72.7%)	1 (9.09%)	1 (9.09%)	0 (0.0%)	11
TOTAL	49	35	6	1	92

Positive student interactions are evident from the qualitative data as well. In fact, many female faculty of color

spend a great deal of time mentoring students, especially students of color, women students, and other underrepresented or marginalized students who seek them out. Students are sometimes so dependent on particular faculty that it becomes challenging for the professors to meet their other personal and professional obligations. In spite of positive interactions with students overall, most women of color report serious challenges from students in both the classroom and during private meetings elsewhere on campus.

#### A. “Positive” Personal Interactions

*“I love my students as a general matter. I always have.” -Grace*

##### 1. Role Modeling

Faculty members from all racial/ethnic and gender backgrounds are positively glowing about their students. For instance, a Latina law professor named Martha says that students are “the best part of the job really.” Laura, a Native American, agrees, stating, “Oh well, of course, your relationship with students is one of the best parts about the job.” Adam, a white man, says, “I really like our students.” A multiracial faculty member named Grace gushes, “I love my students as a general matter. I always have.” Chloe, a white female faculty member says, “To me the students are the best part of any law school.”

Female faculty of color are especially grateful for and receptive to the students of color and other marginalized students who gravitate toward them. Aisha, an Asian American, notes that she has “a following . . . I have my groupies and they follow me from class to class and I have never ever had an issue filling my classes.” Imani, a Black female, is also “very close to the students.” She notes that because the first institution where she taught had an especially diverse student body, “I could earn my stripes as a new teacher in a room full of students that generally looked like me.”<sup>117</sup> Perhaps because of their shared identity, Imani’s former students accorded her a great deal of respect from the outset of her

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<sup>117</sup> Imani began her law teaching career at a historically Black institution. In fact, the experiences for both students and faculty at historically Black institutions differ greatly from those at predominantly white institutions, including diverse schools that were not founded on a mission of educating traditionally underrepresented students. See, e.g., Guiffrida, *supra* note 59. In part for these reasons, historically Black law schools are not included in the DLA sample, though some experiences working within them come through from faculty who taught at those institutions in the past and now are employed by predominantly white law schools.



law teaching career; she therefore “did not have to deal with a lot of the challenges” facing faculty of color at predominantly white institutions “in regards to white male students challenging them and this presumption of incompetence.”

Sometimes students at predominantly white institutions are especially grateful for the few faculty of color employed there.<sup>118</sup> Erin, a Native American law professor, appreciates that her students “are very hardworking” and “dedicated.” She recognizes that their respect and deference to her may be because “they’re thankful” that a Native American woman joined their faculty, since there are very few students of color on campus and even fewer faculty of color. In fact, it is a common occurrence for faculty diversity to lag behind student diversity, even or especially at schools with little student diversity.<sup>119</sup> Hannah, a multiracial female who is very involved with student events and competitions, says that the students at her institution “are so kind,” she says she receives “dozens” of thank you notes “on an annual basis” from grateful students who appreciate the considerable time and attention she lavishes on them.

## 2. Overburdened by Service

The students send these notes to reward Hannah’s hard work and extraordinary efforts at supporting them. Female faculty seem especially connected with their students, as well as both nurturing and willing to take time to counsel students through personal and professional matters. Past empirical research using law student research subjects has shown that students from all race and gender backgrounds are especially drawn to female faculty and faculty of color.<sup>120</sup> “Students of color and white students alike report that faculty of color are often more accessible than whites and that female faculty tend to engage students more than male faculty.”<sup>121</sup> This accessibility comes through in the DLA data as well. For instance, Hannah knows that because the students view her as

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<sup>118</sup> For more on faculty-student interactions from the student perspective, see Meera E. Deo et al., *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1, 17 (2010). Students from all race/ethnic backgrounds flock to white women and especially women of color for support with personal and professional matters. See Deo et al., *supra* note 79, at 87.

<sup>119</sup> See, e.g., Anupam Chander et al., *Why Don’t Law Faculties Look Like Their Students? Some Conjectures*, Paper Presentation at Law & Society Annual Meeting (June 2012) (presentation slides on file with the author).

<sup>120</sup> See, e.g., Deo et al., *supra* note 79, at 87.

<sup>121</sup> *Id.*

“pretty approachable,” they seek her out not only for help understanding class material, but for any number of personal and professional matters:

I have students coming into my office asking for advice in my classes but also what to do with their lives or if they have difficulty in a particular other class how to prepare for that or what courses I might recommend. Or if they are unsure about their schedule and they want to check. I've had students cry in my office because of personal issues.

Similarly, a Latina named Bianca has “a number of students who frequently stop by my office,” some of whom are not even in her classes, but “that just simply know about me or hear about me and want to come get advice about this or that.” A pre-tenured white female law professor named Madison finds it “easy” to interact with her students, especially those who “are not hesitant to come into the office or to send an email and ask a question.” She does not even need to “do so much approaching and encouraging for the students to come and talk to me” because they seek her out on their own. Many students also open up to female faculty and especially female faculty of color about serious life challenges. Haley, a multiracial female, acknowledges, “I get a lot of women coming into my office complaining about sexual harassment, stalking, or domestic violence they are experiencing.” She thinks that “they feel comfortable and they seek my help” in part because she covers all of these issues in her Criminal Law course, whereas “a couple of the men who teach Crim Law [here] don’t cover rape, sexual assault, or domestic violence.”<sup>122</sup> In fact, the literature makes clear that white women, women of color, and men of color are more likely than white men to include relevant context in classroom discussions of substantive law, and that students appreciate these opportunities to engage with what is often abstract legal material on a practical level.<sup>123</sup> It is not surprising, then, that when students see their own experiences within this context, they are drawn to discuss it further with the faculty members who are comfortable bringing it up in class.

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<sup>122</sup> While uncommon, a few male participants in the DLA study also note some close student interactions, including a white male named Joe who says, “I had a number of students come and break down in my office, crying,” and an Asian American named Vijay who notes that he has “an open door policy” and lots of students “asking for guidance” with regard to “career paths or thinking about doing things outside of the law,” and even “personal problems [or] problems they are having with other faculty.”

<sup>123</sup> Deo et al., *supra* note 118, at 29. Diversity discussions are classroom conversations regarding sensitive and personal topics including race/ethnicity, gender, and sexual orientation. *See, e.g., id.* at 2-3; *see also* Deo, *supra* note 19, at 95.

Though rewarding, these frequent activities and emotional meetings with students can be a burden for the faculty they turn to: often white female faculty and female faculty of color. In fact, other research has noted that overwhelming service obligations are but one of “a myriad of demands [that] are placed upon their professional lives the likes of which their white counterparts do not . . . experience.”<sup>124</sup> Kayla, a Black female participant in the DLA study, knows this is true for her, noting, “I definitely feel I bear the disproportionate impact, the brunt, of service to students of color.” She knows that students turn to her in times of need; she does not turn them away, but rather encourages them to seek her out as one of the few female faculty of color on campus. White women faculty and especially women of color faculty are particularly welcoming of female students and students of color, whom they realize seek them out because there are few others they connect with on the predominantly white male faculties at most law schools.<sup>125</sup> For instance, a Black law professor named Gabrielle very much appreciates “the opportunity here to mentor African American students. I spend a lot of time. I do the [Frederick Douglas] Moot Court and all those things with them and all those things are personally rewarding for me.” Though Gabrielle notes that these student service experiences are rewarding, they also take up a significant portion of time that she could otherwise spend on research, class preparation, other service obligations, or even personal endeavors.

What is especially problematic about these constant service contributions is that they are rarely formally recognized come time for promotion or tenure, or when determining a possible course reduction or yearly bonus. Ava, a white woman, recalls that when she first started teaching 15 years ago, “I was one of the few women in the building and certainly the only young one.” She thinks that may be why she “got surrounded by students all the time [who] wanted my attention.” Ava’s students had few others they felt comfortable relying on. Yet, her colleagues were likely blissfully oblivious that their comparatively smaller investment in these contributions meant that Ava became “weigh[ed] down . . . with university service and mentoring responsibilities.”<sup>126</sup> Though Ava “wanted to be

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<sup>124</sup> Brooks, *supra* note 113, at 420.

<sup>125</sup> In this sense, particular students may be burdening female faculty and faculty of color “out of necessity.” *Id.* at 421.

<sup>126</sup> Mary Ann Mason, *In the Ivory Tower, Men Only*, SLATE (June 17, 2013, 5:30 AM), [http://www.slate.com/articles/double\\_x/doublex/2013/06/female\\_academics\\_pay\\_a\\_heavy\\_baby\\_penalty.html](http://www.slate.com/articles/double_x/doublex/2013/06/female_academics_pay_a_heavy_baby_penalty.html).

the professor that [was always] available for them,” when she gave her students full access, “they would just suck up every ounce of time I ever had.” Unfortunately, the research in this area has consistently shown both that faculty of color and female faculty take on enormous service responsibilities, especially those related to students, and that these undertakings are rarely rewarded or even acknowledged when the larger faculty and administration evaluate faculty for tenure or promotion.<sup>127</sup>

Jane, a multiracial female, has learned to strike a balance, saying that while she used to schedule “particular, private meetings” to look over outlines or talk through class material, she now is more insistent that students make an effort to attend her set office hours for these questions. She was otherwise frequently scheduling meetings with students at times that were inconvenient for her and made both her family life and other work obligations (i.e., research) more challenging. Still, Jane remains accommodating and approachable, saying that “even now if someone has a personal issue that they need to talk about, I would always set a private meeting for that purpose.”

*B. Classroom Challenges: Dissatisfaction Leads to Confrontation*

*“Oh my god, we got the Black lady teaching us and they got the white guy?!” -Susan, recounting student attitudes on her first day teaching*

In spite of their strong relationships with particular students, women faculty members are much more likely than men to have objectively negative experiences with students, especially in the classroom. Scholarship has begun to document the ways in which female faculty, particularly female faculty of color, endure a disproportionate share of classroom challenges from students.<sup>128</sup> In part, this is because “both minorities and women are presumed to be incompetent as soon as they walk in the door.”<sup>129</sup> The early literature on this topic revealed instances where female faculty of color:

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<sup>127</sup> Legal scholar Roy Brooks suggests law faculty of color be given “some relief from committee assignments” to compensate for the extra time they spend on law students. Brooks, *supra* note 113, at 425.

<sup>128</sup> Bell & Delgado at 369-70; Meera E. Deo, *A Better Tenure Battle*, 28 COLUM. J. GENDER & L. (forthcoming 2015).

<sup>129</sup> Sylvia Lazos, *Are Student Teaching Evaluations Holding Back Women and Minorities?: The Perils of “Doing” Gender and Race in the Classroom*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA, *supra* note 25, at 164, 177.

were “shouted down in the classroom by white males, shunned by colleagues, had their teaching credentials openly challenged in the classroom, received anonymous and detailed hate notes critical of their teaching style, syntax and appearance and discovered colleagues had encouraged students to act disrespectfully . . . .”<sup>130</sup>

Sadly, little has changed today. The DLA data reveal how female faculty recognize the disappointment of students who realize they will have a woman of color as a professor. Direct classroom confrontations often ensue, especially from white male students.

### 1. Presumed Incompetent

Some classroom challenges may be attributed to tokenism: the very small numbers of female faculty of color at most institutions mean that each one stands out as different from the norm.<sup>131</sup> Coupled with outright racism or even implicit bias,<sup>132</sup> this difference from the norm translates as a presumption of incompetence and doubts about the qualifications of women of color law professors.<sup>133</sup> Because of this presumption, as a multiracial female named Emma notes, “I have a harder barrier to prove myself to students [which includes] proving that I’m qualified to teach them, that I know my material.” Because they do not look like the traditional (i.e., white male) law professor that many law students expect, most female faculty of color have a hard time convincing students that they are legitimate law professors. Gabrielle, a Black female, acknowledges that “being young and looking very young” combines with her race and gender to count against her; the “looks on their faces on the first day of class when it comes to first year students [suggest their confusion and disappointment], ‘You can’t possibly be my professor!’” A Black female named Susan noted the disappointed looks on her students’ faces on her first teaching day, attributing it to them thinking “they had the dud professor,” and comparing their misfortune to the lucky other section of law students: “Oh my god, we got the Black lady teaching us and they got the white guy?!” Their sense of entitlement to have a white male law

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<sup>130</sup> Gordon, *supra* note 94, at 320 (quoting Linda Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Female Law Professor*, 6 BERKELEY WOMEN’S L.J. 81, 83 (1990-1991)).

<sup>131</sup> See *supra* Table 2 (with AALS statistics showing that women of color account for only seven percent of American law faculty).

<sup>132</sup> For more on implicit bias, see *supra* Part I.A.

<sup>133</sup> See PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA, *supra* note 25.

professor and the injustice they felt at finding their law professor was a woman of color was apparent to Susan.

Aisha, an Asian American, sees the students' disappointment at having her as their professor as coming from her position as "a woman of color in front of students that don't see women of color in those positions of power oftentimes and don't know what to do." Mariana, a Latina, got the sense "[e]arly on [that] they resented me because I was a woman of color. I didn't look like the other guys [teaching]." Of course, she is correct; with only 772 female faculty of color out of almost 11,000 total, women of color look like neither the traditional law teacher nor like most of their faculty colleagues.<sup>134</sup> Gabrielle, a Black female, thinks wistfully about what it would be like if there were more diversity in legal academia, noting that "it might make it seem more normal for me to be at the head of the classroom if there were more people [of color]" in law teaching. Stacey, a Black woman teaching "in a really white place with people who are really white. I don't know how else to describe it!," notes that for many of her students, "I'm the first Black professor they ever had, maybe even their first professor of color." Based on that, she sees "a lot of ignorance" in her classroom and on the campus generally, especially regarding racial sensitivity.

## 2. Confronting the Unexpected Authority Figure

Sometimes that ignorance spills into hostility. Gabrielle, a Black female, recalls that her first semester teaching "started off very bad, very hostile" because of "some students who were unhappy to have the young Black professor . . . . And [they] referred to me outside of the classroom as 'that Black professor.'" In fact, after their very first class meeting, "a big group" of students were so "up in arms about it" that they complained to the Assistant Dean.<sup>135</sup> Gabrielle recalls, "[T]he basis of their complaint was, 'She's the new professor. We don't want her. We want the other Con Law professor'—who had been teaching for all of two years." Thus, while the students built a façade of preferring the other professor because Gabrielle was new, the white male professor's own minimal experience reveals that their true rationale for preferring him was likely based on race and gender bias, implicit or otherwise.

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<sup>134</sup> See *supra* Table 2 for details on law faculty statistics by race and gender.

<sup>135</sup> Many women of color in the DLA sample note that students formally complain about them to administrators at their law schools.

Laila, a Middle Eastern woman, also got more than strange looks on her first day as a law professor:

I had this young white male come to me and right in my face, right before we start, I hadn't even started teaching yet, I'd just come to the podium and he looked at me and he goes, "Have you ever taught before?" And I looked at him and I said, "Yes." And he goes, "Yeah, but have you ever taught Torts before?" Literally in that tone and I said, "No, but you'll be okay." He just scowled at me and he walked away.

Again, this harkens back to the outright confrontations detailed in the early literature. These have not abated in spite of some numeric increases in faculty diversity.<sup>136</sup>

Yet, numeric increases alone are not sufficient. Structural diversity—diversity in numbers—does not automatically translate into meaningful cross-racial interaction, either in the classroom or on campus more generally.<sup>137</sup> In other words, critical mass is a necessary but insufficient condition for ensuring the types of benefits we expect from diversity. For actual benefits of diversity to accrue, individuals must be in mutually respectful environments where they have an opportunity to listen and learn from one another.<sup>138</sup> This environment does not seem to be the standard in law schools today, either for faculty or for students.

A multiracial faculty member named Sofia remembers that "the very first class that I taught was a disaster." First, she recalls "sort of a mutiny" because she banned laptops from her seminar. Parsing just these details, we know already that Sofia had three strikes against her from that first day: the first because she is a female law professor (outside the gender norm), the second because she is a faculty member of color (outside the racial norm), and the third because she banned laptops (outside the norm at her school of allowing laptops in class). Sofia remembers the rest of the semester as "truly dreadful," with a variety of confrontations in every class: "people being very obnoxious and defiant and texting, like

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<sup>136</sup> In fact, the numbers have increased significantly from the slightly over 300 faculty members in the legal academy whom Bell and Delgado attempted to include in their study, though the qualitative experience remains troublingly similar. Delgado & Bell, *supra* note 14, at n.17.

<sup>137</sup> See Deo, *supra* note 19, at 84.

<sup>138</sup> See, e.g., Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & SEXUALITY REV. 133, 171 (1991) ("Empirical research with other minority groups has shown that inter-group contact often reduces prejudice in the majority group when the contact meets several conditions: When it is encouraged by the institution in which it occurs, makes shared goals salient, and fosters inter-group cooperation; when the contact is ongoing and intimate rather than brief and superficial; and when members of the two groups are of equal status and share important values.").

having their iPhones out and texting right in front of me.” They also expressed their displeasure with Sofia outside of the classroom; she recounts that “three students ran a campaign about how I should lose my job,” seeking support from the administration in their quest to be rid of her. Because of the painful experience, especially the ways in which “race was brought up in all of this hostility,” she has never taught the seminar again. Similarly a Black woman professor named Keisha remembers that “one student basically told me that they had other things to do than to do my written assignments.” Of course, failure to complete required assignments would count against the student when it came time for grading, but the student’s brazen disrespect made for a challenging classroom environment for Keisha in the meanwhile.

Armida, a Latina, recognizes that the students who are constantly challenging her “tend to sit together,” and are usually “white, male, [and] arrogant,” especially her second-semester students who “know they’ve done really well” in their first semester of law school. This one semester of law school success gives them “this confidence that they know more than I do,” which leads to “a lot of challenging within the classroom.” Again, this disrespect often stems from the students’ disbelief that the woman of color in front of the room is qualified to teach them and might know more than they do. In Armida’s experience, it is “always white males” who are confrontational, whereas her white female students “tend to appreciate what I’m doing,” and students of color “relate to me and I see it.” Madison, a white untenured law professor, recognizes that “there is a challenge being a younger-looking female professor” especially because there are always some “male students” who end up “challenging your authority.” Natalie, a multiracial female, remembers “one guy who came in 45 minutes late to a 55 minute class.” After Natalie asked him to leave, “he had me up against the wall with his finger [in my face] like, how dare I kick him out of the class.” This physical intimidation may be rare but is still a threat facing female faculty of color on law school campuses today.

Patrice, a Black female who had taught upper-level classes for a few years before being assigned to teach a first-year course, was similarly “unprepared for the level of . . . racism and sexism that people have told me about forever but [that] I’d never experienced” in upper-level classes. She remembers most vividly “the [white] guys with their baseball caps on backwards that are challenging just everything you are



saying.” She tried to maintain the upper hand, to not “follow them down that road and try and maintain control of the class and just teach the class, [but] they are like the gnat just driving you crazy.” Because of this, Patrice learned how much of a “challenge” it is to make students take her seriously when they simply “see young, Black, and female. And I’m not young but I don’t think they know how old I am! And I feel like I just have to work a lot harder to prove my authority and mastery.”

In fact, Patrice does have to work harder than her colleagues since she is battling against the presumption of incompetence that accompanies women of color into the classroom on their first day teaching and takes great effort to overcome.<sup>139</sup> Hannah remembers that “especially my first year, there were students who would ask questions [drawing from] things that were a few pages ahead in the text beyond what the reading assignment was for that given day,” and use a “tone of voice that demonstrated it was a challenge rather than a legitimate question.” She makes clear that these were not necessarily “illegitimate question[s], but rather than simply a question that the tone of voice was very challenging.” So she would register the question, coupled with “the tone of voice,” and “the look on the face,” together she took these as the student attempting to be “very challenging, [as if his motivation were,] ‘Let’s see if she’ll get it or if she can handle it.’” Thus, while particular questions may have been legitimately about the course, they were drawn from material not assigned for the day, coupled with a confrontational tone and a superior look on the student’s face to make clear the question was more of a challenge than a polite and enthusiastic inquiry from an eager learner.<sup>140</sup>

Sometimes classroom confrontations spill into challenging private meetings. For instance, a Latina named Bianca recalls “my very first semester a student coming in[to my office], and I think he thought he was maybe doing me a favor, and saying, ‘I’m just not used to someone who teaches like you,’” and suggesting changes to her teaching style and pedagogical approach. It was likely true that this student had not had anyone who looked like Bianca teaching him before,

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<sup>139</sup> Individual strategies for overcoming the structural challenge of being presumed incompetent, as well as some necessary structural solutions, are discussed *infra* at Part IV.B.

<sup>140</sup> Some white male colleagues have a hard time believing these as anything other than legitimate questions. Yet, many women of color in the DLA sample articulate Hannah’s experience of the context coupled with the question indicating it is more of a challenge to authority than an innocent inquiry.

given the paltry numbers of female faculty of color in legal academia.<sup>141</sup> Yet, he either failed to register as disrespectful his request that his law professor change her style to accommodate his preferences, or was unabashedly rude to his Latina professor. Even more dramatically, a Black woman named Trisha recalls, “I had one student tell me once, and he thought he was being a friend, he said, ‘I never had a Black woman tell me anything who wasn’t dressed in white.’” Initially confused about what this meant, it “took me a minute [before realizing that] the roles he was assigning me were maid, nurse, [etc.].” As Aisha, Mariana, and others note, they are often the students’ first woman of color authority figure; Trisha’s student simply made explicit the roles he expected Black women would continue to play in his life. Jennifer, a Native American, had a private meeting with a white student who felt she deserved a better grade than the one she earned. Jennifer recalls:

[The student] was very disrespectful. And when I explained to her why she received the grade she had, she rolled her eyes and crossed her arms and said bad things about my teaching. You know, “Well you didn’t explain this right.” At one point I just stopped her and said, “I don’t think we’re communicating in a positive way right now,” and so I said, “Maybe we should take a break and check in after we’ve both had some time to cool down a little bit.” And she got up and stormed out of my office. She left and I said, “I think we should talk again.” And she said, “No, don’t bother.”

Thus, even when female faculty of color reach out to students and make attempts to be inclusive and understanding, these efforts are often rebuffed by students who are unable or unwilling to recognize that all of their faculty members are competent, but instead take every opportunity to challenge the authority of the female faculty of color.<sup>142</sup>

### C. Comparison & Contrast

*“I’ve never been a professor who students approach when they have issues.” -Ed*

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<sup>141</sup> Again, Latinas comprise just 1.3% of American law professors—including not only tenured and tenure-track faculty, but also visitors, contract, legal writing, library, and other faculty members. With just 138 Latinas out of 10,965 law faculty members total, this particular student would likely never encounter a professor who looked like Bianca again. See *supra* Table 2.

<sup>142</sup> Some students leave equally egregious anonymous comments on teaching evaluations, especially when commenting on female law faculty of color. Analyses of the DLA data show that women of color law professors endure spiteful, unproductive critiques from students, many of which focus on style or personal appearance instead of teaching effectiveness. For more on these additional but related challenges, see Meera E. Deo, *A Better Tenure Battle*, 31 COLUM. J. GENDER & L. (forthcoming Aug. 2015).

Male law professors from different racial/ethnic groups offer interesting contrasts to the experiences of the women detailed above. Some male faculty of color have similar experiences with students outside of the classroom. Many are inundated by student requests that they feel compelled to accept, which leaves less time to work on research or focus on other responsibilities. For instance, a Native American man named Stuart recognizes the significant burden that he and other faculty of color face because “the diversity of the students is much better than the diversity of the faculty in terms of mere numbers, [which means that] faculty of color are inundated with all this extra work.” Stuart is “constantly asked to advise on papers and for groups and to go to events,” especially by students of color. Although he “want[s] to do as much as [I] can,” he has “little kids at home and it makes it difficult” for him to commit to these extra work obligations and still meet his personal responsibilities.<sup>143</sup> He does not think his situation is unique, but rather thinks that “all the faculty of color are inundated.” In fact, the literature supports this perspective, explaining that a number of students of color “simply feel that there is no one else on the faculty who can understand their problems or who really cares about resolving them.”<sup>144</sup> In spite of his efforts at accommodating student requests, Stuart is disappointed that all of these extra efforts directed at students do not count for “anything when it comes to going up for tenure.”

On the other hand, the experiences of most white men and some men of color in the DLA study differ considerably from the general trend among female faculty and especially female faculty of color who go to great lengths to meet their students’ needs. Ed, a multiracial man, and Ian, a white man, offer interesting and representative contrasts to the experiences of Kayla, Gabrielle, Jane, and other female faculty of color. While Ed’s relationship with students overall is “[p]retty good,” even the students of color “really don’t lean on me,” he admits, “I’ve never been a professor who students approach when they have issues.”<sup>145</sup> Similarly, Ian notes, “I

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<sup>143</sup> For more on work/life balance among law faculty, again drawing from the DLA data, see Meera E. Deo, *Becoming Family Friendly* (work in progress) (on file with the author).

<sup>144</sup> Brooks, *supra* note 113, at 421.

<sup>145</sup> Some men of color in the DLA do make a concerted effort to connect with students. Vijay, an Asian American, says his “relationship with students is very positive,” perhaps in part because he “believe[s] faculty members are there to serve the students.” A Black man named Michael “handpick[s] mentees from the 1L class,” and is so devoted to them that he “stay[s] up at night thinking about them and how to get

probably don't have as deep a relationship with students where I'm their first call for situations or issues." Again, this is likely because the students' first call is to the female faculty and especially the female faculty of color they sense as the most receptive to addressing their needs.

While many white women and women of color struggle to assert authority in the classroom, students give white men and men of color alike significant deference. Joe, like almost all faculty in the DLA sample, found his first days of teaching "[v]ery stressful," in part because he was new to the material and "wasn't as in command of the subject matter" as he would have liked. Nevertheless, within "a month or two, I got the hang of it and everything felt fine." For Joe, a white male law professor, only the material was challenging, not the students or their interactions with him. In fact, when Joe reflects on the large first-year classes he taught, he remembers both that he "enjoyed that," and that he was slightly concerned about how the students did not interact much with him because they were "intimidated by me." Thus, the students were so respectful of their white male professor that they rarely interacted with him at all—perhaps the opposite of the near-constant confrontations facing female faculty of color in the classroom.

Similarly, when asked to reflect on his first year teaching, an Asian American man named Andrew recalls, "It was overwhelming how much work it was," even in comparison to earlier full-time positions as a judicial law clerk and law firm associate. Yet, Andrew had no confrontations from students or challenges to his authority in the classroom. Instead, he says of the students that "even my first year, everyone was supportive." In spite of his current acknowledgment that "[l]ooking back, I feel that the quality of my teaching wasn't great," at the time he nevertheless "consistently got amazing reviews and feedback from the students."<sup>146</sup> Again, Andrew's male privilege in the classroom likely afforded him a measure of respect wholly absent from the classrooms of his female colleagues. This enabled him to focus on mastering the material, while his students encouraged and supported him as he learned how best to teach them.

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them the next opportunity." While Michael puts "a lot of time and a lot of investment" in his mentees, most men in the DLA sample do not seem to follow his lead.

<sup>146</sup> Jack, an Asian American male, is especially sensitive to how some faculty fail to take him seriously or even mistake him for a student. Still, this has never been a hindrance in the classroom; he even won a teaching award soon after he started teaching law.

#### IV. BEST PRACTICES: STRATEGIES TO COMBAT DISCRIMINATION

*"I think over-preparation is the norm. I mean you just don't get the benefit of the doubt." -Brianna*

##### A. Creating Faculty Inclusion

*"Hey, why are we all looking at the girls? I'll take notes [today]. Next time, John, you can take notes." -Abigail, recounting a suggestion from her white male colleague*

Just as Bell and Delgado noted 25 years ago, a number of faculty of color in legal academia today are distrustful of their faculty colleagues.<sup>147</sup> Women of color face intersectional discrimination, doubly discriminated against because of their multiple devalued identity characteristics.<sup>148</sup> While many faculty members from traditionally and currently underrepresented groups characterize their relationships with peers as cordial, most are not close, especially to white male faculty members. Instead, the closer relationships for female faculty of color are with other individuals from marginalized groups, including women, people of color, and those in the LGBTQ community. Many see through the mask of collegiality to the incivility of their colleagues. The distrust that many female faculty of color feel is based on challenging interactions, including numerous instances of white faculty trivializing their experiences, denigrating their work, and putting roadblocks in the way of their professional success.

The DLA study reveals that there are ongoing gender-related incidents on law school campuses, many of which invoke both racism and sexism.<sup>149</sup> To combat this, even small changes can have a big impact on gender inclusion. Participants in the DLA study identified a number of "best practices," tried and true strategies for combatting the discrimination they continue to face. This Part shares findings

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<sup>147</sup> Delgado & Bell, *supra* note 14, at 357-59.

<sup>148</sup> DLA includes male and female LGBTQ participants, including white and non-white law faculty members. However, the data does not reveal patterns of overt discrimination or harassment based on sexual orientation or ways in which sexual orientation couples with other identity characteristics to create intersectional bias. This may be because there were only small numbers of members of the LGBTQ community as compared to the total sample, and because intersectionality based on sexual orientation was not the focus of the study, and so direct questions were not asked on the topic.

<sup>149</sup> For more on intersectionality, see Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, *supra* note 30; Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *supra* note 30.

that are focused on solutions. These data from women and men legal academics invoke strategies that have been effective in particular instances that others could employ to attain similar positive results.

Destiny has two suggestions from her own experience as a Black woman in legal academia. First, she says her school has been working on “changing our meeting times to make them in the middle of the day” instead of at 4:00pm as they had been for years. Why would that make a difference? She explains:

Well, guess what? Half the women disappear at 3:00! A couple of the men did as well, but almost all the women would disappear and . . . that is significant [because] when it came to decision-making, [women] were just not present because we were off picking up kids from school or taking them some place or that sort of thing.<sup>150</sup>

Thus, simply changing meeting times to accommodate the personal realities of many faculty members is one small structural change that could lead to much greater inclusion, both symbolically and actually.

Destiny highlights another often-unrecognized challenge for women: teaching on Mondays. Even in academia, women remain the primary caregivers for children.<sup>151</sup> During the traditional Monday to Friday workweek, most children of academics are in day care or school.<sup>152</sup> Destiny notes, “If you work Monday you have to prep probably on Sunday,” which is challenging for most women since schools/day cares tend to be closed. The result is that many women are often “up late on Sunday nights trying to prep for our classes” while the kids are asleep. An alternative structural solution that takes these realities into account would be to give parents the option of teaching on Tuesdays or later, so they could “have four or five hours to work” on class preparation every Monday without “the young people underfoot.”

While family-friendly scheduling of meetings and classes can make a difference, additional changes are needed if women are to have a true voice at those very meetings, as they too often complain of silencing and invisibility on the campus as a whole and in faculty meetings in particular. Recall Abigail’s recollection of her early days in law teaching when her male colleagues expected their female faculty colleagues to

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<sup>150</sup> Lest these women stand accused of working less than a full time day or somehow shirking their professional duties, many women in the DLA sample note that their workdays resume again for many hours around 8:00 or 9:00pm when their children are in bed.

<sup>151</sup> See Mason et al., *supra* note 126.

<sup>152</sup> Some participants in the DLA study with very young children engaged nannies or babysitters instead of or in addition to relying on day care or school.

take notes at faculty meetings—essentially relegating them to the role of secretary rather than equal faculty members. Abigail notes that the practice “has abated” at her institution in part through the hard work and persistence of one of her white male colleagues. She says that 20 years ago, when this practice was rampant, “he would say, ‘Hey, why are we all looking at the girls? I’ll take notes [today]. Next time, John, you can take notes.’”<sup>153</sup> True, his speaking up could be considered a form of “mansplaining,” but it got the job done, removing secretarial work from the realm of female faculty members to rotate among the men in the room or at least be spread equally between all faculty colleagues. Allies participating in educating white male colleagues can thus be particularly effective.

It is especially necessary for law school administrators to take note of the horrific examples of gender discrimination plaguing law schools, from outright sexual harassment to other means of creating a hostile or unfriendly work environment for women. All law schools should have sexual harassment policies in place, including zero tolerance for violations. There should also be clear reporting requirements and guidelines to ensure that the documented silencing of women does not work against reporting efforts. In fact, many colleges and universities around the country that have recently been criticized for their lack of reporting and enforcement mechanisms to prevent sexual harassment and sexual assault on and around campus have quickly intensified efforts to comply with Title IX.<sup>154</sup> Law schools should follow their lead before the U.S. Department of Education targets them for their lack of compliance with federal law.<sup>155</sup>

### *B. Combatting Discrimination in the Classroom*

*“I use a lot of skills of being a mother: very sweet, very nice, very nurturing, but switching at a moment’s notice and letting them know there is no messing around in my class and these are my expectations. And also I take a very feminine approach to it; it’s about establishing relationships where they don’t want to let me down.” -Eliana*

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<sup>153</sup> Note that even this white male defender and educator referred to his female colleagues as “girls”!

<sup>154</sup> For instance, “55 colleges and universities nationwide [are] under scrutiny by the U.S. Department of Education for [their] handling of reported sex crimes on campus.” Jack Flynn, *Amherst College, Responding to Federal Title IX Probe, Cites Major Improvements in its Handling of Sexual Assault Complaints*, MASSLIVE (May 1, 2014, 7:12 PM) [http://www.masslive.com/news/index.ssf/2014/05/amherst\\_college\\_responding\\_to.html](http://www.masslive.com/news/index.ssf/2014/05/amherst_college_responding_to.html).

<sup>155</sup> This Article does not seek to expound on the requirements of Title IX; it is mentioned here only to emphasize the real threat that federal authorities could intervene to ensure compliance.

In spite of their many positive interactions with students, female faculty of color also endure challenging classroom confrontations, especially from white male students. Existing literature has documented how many of these faculty members enter the classroom with a presumption of incompetence working against them.<sup>156</sup> Some faculty members have devised creative strategies to combat these classroom challenges on their own. Yet, individual efforts are not enough; broader structural support, following the lead of the institutions discussed below, is also sorely needed.

1. Individual Strategies: Over-Preparation, Confidence, and the Art of Gender Judo

Many female faculty of color respond to anticipated or real student confrontations in the classroom by working harder than they thought possible, mastering the material before they even enter the classroom in order to combat the presumption that they are not qualified to teach. Hannah, a multiracial woman, believes she “had to do more to prove that I knew what I was talking about than I would if I were a white male. I firmly believe that.” Hannah recalls being “challenged” in the classroom frequently, especially when she first started law teaching, and the challengers “tended to be white men, absolutely.” In order to prove her competency, Hannah took to “infusing references to things that demonstrated the depth of my knowledge.” For instance, she made sure to mention her prior, prestigious, corporate law practice and specifically drew from her practical experience when discussing particularly difficult material in class. While many law professors mention prior practice and share practice-related insights in class, Hannah did so specifically in order to “demonstrate the kind of work that I was working on and that it directly related to what I was teaching them.” In this way, she could assert her competence and prove to her students that she was qualified to teach them, at least for this particular subject.

Similarly, a Latina named Armida believes that “it’s all about credentializing yourself,” especially to gain legitimacy with the “white males” who tend to challenge her in the classroom. Thus, she suggests the following as “a tactic you can employ” sometime “at the beginning” of the academic year: “incorporating in the conversation [past] experience from a

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<sup>156</sup> See generally PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA, *supra* note 25.



large law firm. That impresses them [and] gives them a value in me. [They think,] ‘Sullivan & Cromwell, that means that she’s smart.’”

A Black senior female named Brianna suggests that it may not be enough to “know the stuff inside and out,” or reveal previous prestigious work experience. Hannah’s experience makes this clear, because in spite of her hard work and over-preparation, she was still frequently challenged in class. Even her attempts to prove her competency were not met with complete respect. Brianna notes that because “people of color and women in particular don’t get the benefit of the doubt” that they are experts and know the material well, “over-preparation is the norm” for them. She believes that older, white, male professors “can walk in with old crusty notes and not have really innovated their classes in a lot of different ways and can not be on the top of their game on any given day,” and students will not punish them for their lack of preparation because they at least look like what the students expect in a law professor. Of course, women of color law professors are not “afforded that luxury,” and therefore have to work much harder to earn and keep their students’ respect.<sup>157</sup> Brianna explains that while you “have to know your material,” it is equally important to “exude a confidence [through] a classroom persona.” She warns that female faculty of color who do not “go into that classroom and command that classroom” meet “students [who] sense vulnerability [and] will devour you.” Thus, it is not sufficient to prove competency by mastering the material; women of color must also exude confidence to be believable as law faculty members.

Eliana is a Latina who started a tenure-track position only recently. Yet, like Brianna, she “spent so much time” anticipating classroom challenges and developing strategies to avoid or combat them. Perhaps because of this, during her first year in law teaching she “never had a student challenge me.” Eliana provides many of the same suggestions as Brianna; for instance, “I immediately come in with a lot of authority, with a lot of telling [the students], ‘These are my credentials.’ ‘This is why we are doing this.’” If any issues arise, Eliana “use[s] humor” to neutralize tension, and also “a lot of skills [from] being a mother: very sweet, very nice, very nurturing, but switching at a moment’s notice and letting them know there is no messing around in my class and these are my expectations.”

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<sup>157</sup> This Article does not suggest that most white male law professors are not innovative or excellent teachers; the inclusion of Brianna’s quote is simply to highlight a pattern in the data identifying the opportunity for older white male professors to rest on their laurels (even if they are not doing so), while women of color rarely have laurels available.

She describes this as her “feminine approach” to teaching, where the focus is on “establishing relationships where they don’t want to let me down” and believes this is why “students work really hard in my class.” In fact, researchers would characterize Eliana’s strategy as an example of “gender judo,” defined as the purposeful decision to “take feminine stereotypes that can hold women back—the selfless mother and the dutiful daughter, for example—and use those stereotypes to propel themselves forward.”<sup>158</sup> In spite of her success in employing gender judo, Eliana realizes that it “takes a lot of energy” for her to utilize this approach, “versus a white male colleague” who she believes would not have to strategize about asserting classroom authority and work as hard to maintain it.

## 2. Structural Suggestions: Mentors, Allies & Administrative Support

In addition to individual attempts to combat bias, some schools have found ways to offer structural support to faculty with regard to their teaching. Most do not target these efforts at improving the experience or the retention rates of female faculty of color, though they tend to have that effect. For instance, some schools offer new law teachers a “light load” in the first year or semester, where they teach just one class during their first semester and one or two during their second semester (at schools where the standard may be two classes per semester). This allows new faculty to ease into the law school environment and especially into class preparation. When Abigail, a senior white scholar, first started teaching, she says her school “didn’t, as we do now, allow our first year, first semester teachers to have a light load.” As a result, she recalls, “I taught four courses my first year, Torts I [and] Criminal Law in the Fall [then] Constitutional Law and Torts II in the Spring.” She clearly had no opportunity to ease into law teaching; in fact, during her first year on the faculty, she “had two-thirds of the [entering] class” of students in at least one of the “four huge classes” she was assigned to teach.

The “light load” may be especially important for women of color, as class preparation for this group refers not only to mastering the substantive material they plan to teach, but also the pedagogical approach and detailed strategies they will

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<sup>158</sup> Joan C. Williams, *Women, Work and the Art of Gender Judo*, WASH. POST (Jan. 24, 2014), [http://www.washingtonpost.com/opinions/women-work-and-the-art-of-gender-judo/2014/01/24/29e209b2-82b2-11e3-8099-9181471f7aaf\\_story.html](http://www.washingtonpost.com/opinions/women-work-and-the-art-of-gender-judo/2014/01/24/29e209b2-82b2-11e3-8099-9181471f7aaf_story.html).

employ to keep the class on track. For instance, a multiracial faculty member named Hannah is especially appreciative of the structural support she has received at her school. For all new law faculty members, in their “first year and the first semester, fortunately, we have a lighter load, so my introduction was merely preparing one class, and then the second semester I prepare[d] two.” This gave her the freedom and flexibility to spend considerable time on class preparation, noting that in her early years of law teaching, she “basically was working [the equivalent of] large law firm hours” in order to master the material and present a fully competent self in class, in part because she is motivated to be “as good as I can be for my students.”

While Hannah did work hard, she also credits mentorship and faculty support for improving her teaching. She notes, “Fortunately, there are two other professors here that teach [my first year course] on a regular basis, and one of them used the same textbook [as I did]. The other one has been teaching for probably something like 30 years.” While her school did not have a formal mentor program in place to connect her with these senior scholars, they had an informal open-door policy to encourage new faculty to feel comfortable approaching them for counsel. Hannah readily took advantage of the welcoming atmosphere at her school and especially the encouragement she received from those teaching in her subject area, and “would regularly just shoot them questions about the questions a student had, and I thought I had the right answer, but I wanted to make sure.” Thus, rather than avoiding her colleagues because they looked down on her, believed her to be ill-prepared, or were jealous of her accomplishments, Hannah was in an environment where she was made to feel comfortable reaching out to her colleagues for reassurance that she had the right answers and was well prepared to respond to her students. She would also ask these mentors directly, “How would you present this material?” And I would get back answers,” rather than snarky comments or hostility. Hannah was actually so comfortable asking for help that “sometimes I would just stop them in the hallway and ask them questions too.” All of these efforts at connecting with faculty, seeking out advice, and taking suggestions paid off. In spite of some challenging classroom confrontations from white male students, Hannah persevered, eventually earning two teaching awards in less than a decade of law teaching.

Mentorship does not necessarily involve a shared race or gender identity. Many of the women of color in the DLA sample

noted the ways in which white men and white women with positions of power sponsored or supported them, especially when they first entered legal academia. For instance, an Asian American named Vivian says the following of her mentor relationship with a senior white female scholar:

She's my . . . strongest ally. [T]hat relationship has been absolutely pivotal for me here. She was the Associate Dean when I got hired. She was my go-to person when I don't know what to do about something.

Although "most of my colleagues are white" and Vivian maintains "an arms-length relationship" with many, based in part on the distrust discussed earlier,<sup>159</sup> her relationship with this particular mentor has flourished; it is obviously not based on a shared racial identity, though she says specifically, "other stuff trumps race."

There are instances during which administrators took an active role in protecting and safeguarding the careers of vulnerable faculty, where they stood up for the faculty they had hired. Sometimes this was as simple as communicating openly with female faculty of color about student complaints or issues; other times, administrators simply refused to accommodate the outlandish demands of complaining white students or made clear to students that they believed in and supported these often marginalized faculty. In her first semester teaching, a white woman named Madison "ended up having one student who is notoriously difficult [which] made the day-to-day class more challenging." However, because Madison "had the full support of the faculty," it was "easier to manage" since she never felt she was dealing with his disruptions all on her own. In fact, at some point, "the Associate Dean did end up intervening and having a chat" with the problem student to get him in line. Unfortunately, even this basic level of support is the outlier rather than the norm in legal academia.

Lack of administrative support is much more common, leading the faculty members under attack to become further marginalized. Laila, a Middle Eastern female, was not told about numerous student complaints regarding her teaching in a timely fashion, when she could have worked to address them. When the Associate Dean finally conveyed student concerns months later, Laila recalls him saying, "Yeah, I think they said you were really mean, humiliating and degrading." She was shocked, but explained the situation, detailing how one of her

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<sup>159</sup> See *supra* Part II.A. for more on the distrust lurking behind the mask of civility in faculty relations.

students consistently challenged her in class in various ways: interrupting her lectures, announcing that the professor “was wrong” on particular points of law, and even walking out of class during lecture instead of at the scheduled break time.

When Laila forcefully asserted her authority over the class, publicly telling the student that this sort of behavior was unacceptable, her attempted solution backfired and “created a huge chill among the class.” She did not realize then that it would go beyond momentary tension. At the time, she was afraid to discuss the situation with colleagues or administrators because “I didn’t want to be perceived [as if] I didn’t have control over the classroom.” Even years later, she believes that had her Associate Dean told her about it earlier, “maybe I could have had a discussion with them” to resolve what she had not realized was an ongoing student concern. She also realized later that the administration had not positioned her in a way to make a smooth transition into law teaching by giving her a light course load or small seminars to teach; instead, though it “was my first semester teaching [they] gave me two sections of Torts, so of course I’m not going to get professor of the year.” Overall, she was concerned that the administration was “looking at all the negative things” that students said, not allowing her the opportunity to share her side of the story, and “giving the students way more credit” than they deserved, while also “completely ignoring the things I was accomplishing.” Thus, the administration not only set her up to face great challenges by giving her two large first-year classes to teach during her first year on the faculty, but in taking the students’ side, they also further marginalized and devalued Laila’s competency as a legal academic.

Alicia, a Latina faculty member, had a white male student who was “very hostile” toward her during her first semester as a law professor. That student complained to one of Alicia’s “white male faculty member” colleagues about her pedagogical approach and demeanor. Rather than defend her to the student or suggest the student talk with Alicia directly, Alicia’s colleague promptly “assumed that of course the student was correct in his complaints.” When Alicia’s white male colleague later approached Alicia to discuss the situation, it was as an advocate for the student, speaking on his behalf. For Alicia, the “unfortunate circumstance of this faculty member taking the student’s side is that [it] empowered the student to act out even more” in class, which in turn led other students to get more comfortable challenging her as well. Ultimately, she

had “a little cabal of problematic students that I then had to manage” throughout the semester, disrupting her teaching and ruining the learning environment for all students. Just as with Laila’s example, Alicia’s challenging situation could have been nipped in the bud with the proper administrative support; instead of taking her side outright or discussing the situation with her in an open-minded fashion, her colleague sided with the aggrieved student, complicating circumstances further.<sup>160</sup>

## CONCLUSION

*“[I]f you would like a woman of color on your faculty, then you have to go and hire a woman of color. You can’t [simply] hope a woman of color comes your way.” -Ryan*

As a formal quantitative and qualitative national study of law faculty, DLA reveals the current climate in legal academia, and the unique challenges facing women of color. The environment creates obstacles for women of color law teachers that inhibit not only their success, but student learning as a whole. The good news is that legal institutions can employ strategies to combat these challenges and level the playing field so that law faculty from all backgrounds can succeed and students can focus on law school learning.

Many faculty members appreciate their colleagues and their work environments, though they worry about the bias and enmity lurking just below the mask of collegiality. Gender discrimination, from silencing and invisibility to outright harassment, plagues white women and women of color alike. Interactions with students are similarly varied, and similarly infused with both racism and sexism.<sup>161</sup> Individual faculty members from all racial backgrounds, including men and women, report positive relationships with students. Yet, women

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<sup>160</sup> Alicia ultimately decided to talk with her colleague not only about how his interference may have undermined her authority in the classroom, but also thereby worsened her classroom situation. She used scholarship to connect with him, because when she first approached him to discuss the situation, “I said, ‘We need to talk about what happens in the classroom to women of color and I need you to read this article.’” To his credit, he did and a productive discussion followed. This could be seen as another individual strategy that others could employ, educating their peers about their experiences in legal academia so that they understand the unique challenges, and perhaps will sympathize and take them into consideration come time for tenure or promotion review.

<sup>161</sup> LGBTQ individuals, disabled individuals, and those from various socioeconomic backgrounds participated in the DLA study. These background characteristics were not presented or discussed in this Article in part to protect anonymity of participants. However, these salient characteristics likely have an effect on interactions as well, including marginalized populations suffering “othering” among faculty and challenges from students.

faculty and especially women of color endure disrespectful classroom confrontations from particular students.

Contemplating these challenges and opportunities collectively, it seems clear that legal academia is long overdue for broad structural change. While legal academia currently confronts a number of external challenges, it is past time for these institutions of higher learning to also do some internal soul-searching.<sup>162</sup> Many changes should be swift and dramatic. For instance, law schools should immediately institute policies to safeguard against ongoing gender bias and sexual harassment. There should be zero tolerance for student-initiated, disrespectful confrontations in the classroom, which not only harm the law professor, but are disruptive distractions from learning for all students. Administrative support, rather than acquiescence or collaboration with student detractors, is also crucial to ensuring the success of all law professors and the students they seek to teach.

Other changes may have to be more subtle or gradual. How can administrators offer support to women of color so that they might improve student-faculty interactions? When faculty members demonstrate that women of color faculty are competent, experienced, and respected colleagues, rather than belittle or silence them in public and private, students may follow their lead. When the administration stands up for white female faculty and both male and female faculty of color, rather than siding with students, that too sends a clear message that these nontraditional faculty are nevertheless valued, warning students against future transgressions.

What follows is a list of specific proposals that administrators and faculty who are seriously committed to improving the experience of all law faculty and law students can adopt to move in the direction of more equality-based and equity-focused institutions:

- Loudly and proudly advertise not only a presumption of competence, but a presumption of excellence for all faculty
- Create formal mentoring programs that are subject-specific for new law faculty regarding both teaching and scholarship

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<sup>162</sup> External challenges currently facing legal academia include declining admissions rates, shrinking faculties and faculty budgets, and forced changes to curriculum and pedagogy. See, e.g., TAMANAHA, *supra* note 67, at 162-63; Herrera, *supra* note 67, at 209; Ernde, *supra* note 68; Jones & Smith, *supra* note 4; Schrag, *supra* note 67, at 407-08; .

- Cultivate an environment conducive to informal mentoring so that new law faculty can connect with senior scholars in a safe environment without judgment or tension
- Support law faculty in any challenges from students; while we must all be open to critique and willing to recognize our errors, give faculty the benefit of the doubt instead of readily agreeing with student complaints that confirm existing race/gender stereotypes
- Adopt a zero-tolerance sexual harassment policy defining violations and clarifying the appropriate reporting mechanisms as well as harsh penalties for violations
- Require participation from all faculty members in annual racial and gender equality trainings/workshops
- Discuss creative solutions for institutional housekeeping so that note-taking and other internal administrative requirements rotate equally among all faculty
- Reward extraordinary service commitments, including significant outreach to students, with decreases in other service or teaching obligations

This list should not be seen as exhaustive, or a panacea that will eliminate all vestiges of racism, sexism, and the intersection of the two in the legal academy.<sup>163</sup> In fact, when the DLA participants were asked for their own suggestions for how to improve diversity in legal academia, some of the most thoughtful responses came from those making clear that there was nothing new to suggest. For instance, an Asian American woman named Surya notes, “I honestly don’t think the problem is that administrators don’t know what they can do.” Her perspective is that many do not feel it is important to diversify the faculty in the first place, again suggesting diversity may be a “surface” value rather than a “core” goal for many institutions.<sup>164</sup> A Black faculty member named Ryan offers a particularly poignant suggestion: “[I]f you would like a woman of color on your faculty, then you have to go and hire a woman of color. You can’t [simply] hope a woman of color comes your way.”

This Article and the DLA data overall are more hopeful about the possibilities for and likelihood of change. Outreach, support, and a willingness to engage with underrepresented legal scholars would go a long way toward improving retention rates for faculty. As Isabella, a white woman, notes, to retain diverse

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<sup>163</sup> For more strategies to combat institutional bias, see Yolanda Flores Niemann, *Lessons from the Experiences of Women of Color Working in Academia*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA, *supra* note 25, at 446-99.

<sup>164</sup> See Lee, *supra* note 108, at 479-80.



faculty, “you have to make the work environment a friendly enough place that someone wants to be there.” Thus, the proposals above will only truly be effective when coupled with a sincere desire to diversify the faculty, to recruit and retain white women, women of color, men of color, and others from non-traditional and traditionally underrepresented backgrounds.

The DLA data reveal that marginalized faculty members are coping as best they can, creating strategies in the hallways to navigate difficult interactions with colleagues and in the classroom to guard against or respond to student confrontations. However, greater structural support is necessary to meet the identified structural challenges. We cannot expect individuals to fight alone against structural bias and win.

The real winners in a legal academy free of institutional bias are not only those facing that bias now, but also other faculty members who could learn and grow through respectful interaction with their colleagues. Students of color would be better served as well without the distractions of classroom confrontations and other challenging interactions on campus. Yet, since structural diversity (e.g., an increase in the number of underrepresented faculty) does not lead automatically to interactional diversity (i.e., meaningful cross-racial interaction), we must do more than diversify our faculty.<sup>165</sup> While ensuring critical mass is a necessary first step, for law schools to live up to their full potential, the environments must be such that faculty see each other as equals and are comfortable interacting with one another. When that happens, the legal profession as a whole comes out ahead.

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<sup>165</sup> Deo, *supra* note 19, at 82-3, 85.

# RESPONSES

## Correcting the Record Regarding the *Restatement of Property's* Slayer Rule in the *Brooklyn Law Review's* Symposium Issue on Restatements

Lawrence W. Waggoner<sup>†</sup>

John H. Langbein<sup>††</sup>

In 2014, the *Brooklyn Law Review* published a symposium issue on Restatements of the Law.<sup>1</sup> The organizer of the symposium, Professor Anita Bernstein, did not afford an opportunity for Restatement reporters to comment on the articles.<sup>2</sup> The organizer did invite the Director of the American Law Institute, Lance Liebman, to contribute an essay commenting on the symposium as a whole.<sup>3</sup>

Liebman's essay—unintentionally no doubt—misstated the position that we took in formulating the slayer rule for the *Restatement (Third) of Property: Wills and Other Donative Transfers*.<sup>4</sup> Liebman's misstatement—that we recommended that the Institute adopt a rule allowing a murderer to inherit from his or her victim—needs to be corrected.

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<sup>1</sup> Symposium, *Restatement of . . .*, 79 BROOK. L. REV. 381 (2014).

<sup>2</sup> See Anita Bernstein, Symposium Introduction, *Onlookers Tell an Extraordinary Entity What to Do*, 79 BROOK. L. REV. 381 (2014).

<sup>3</sup> See Lance Liebman, Symposium Afterword, *Law Reform Agenda as ALI Approaches Its Centennial*, 79 BROOK. L. REV. 821 (2014).

<sup>4</sup> RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 (2003) [hereinafter PROPERTY RESTATEMENT] ("Homicide—The Slayer Rule").

The passage in question observes that the Institute's deliberative process on occasion "resolves an inconsistency"<sup>5</sup> among the reporters of different Restatements.

The best example during my Directorship was when Andrew Kull, from his grounding in the law of restitution and unjust enrichment, persuaded the membership to require Lawrence Waggoner and John Langbein, the Reporters for wills and other donative transfer[s], to alter *their recommendation that a murderer be able to inherit from his or her victim*. Indeed, could there be a more unjust enrichment than that?<sup>6</sup>

The well-accepted general principle embodied in the slayer rule is that a slayer is not allowed to benefit in any way from his or her crime.<sup>7</sup> We have never questioned that principle, and accordingly, we did not recommend that "a murderer be able to inherit from his or her victim." The position that we recommended and that the Institute approved is that the "victim's intestate estate passes and is administered as if the slayer predeceased the victim."<sup>8</sup> A long-established corollary of the slayer rule is that the rule does not cause the slayer to forfeit his or her own property. If *X* murders *Y*, *X* cannot inherit from *Y*, but *Y*'s estate has no right to *X*'s property (although, of course, in a tort action, *X* may be found liable to *Y*'s estate in a wrongful death action).<sup>9</sup>

The slayer rule has broad application to a number of subsidiary situations.<sup>10</sup> The disagreement between Reporter Kull and us concerned the application of the slayer rule to one of these subsidiary situations: when two persons hold property in joint tenancy, and one slays the other. In a joint tenancy, each tenant has the unilateral right to sever the tenancy and take his or her own fractional interest outright. Our position, strongly supported by the case law and statutes,<sup>11</sup> was (and remains) that because the right to sever was the slayer's own property, that right is not forfeited by the crime. As we explained in the Reporter's Note, that principle "can be implemented either by imposing a constructive trust in favor of the victim's estate of the victim's fractional share that would otherwise pass to the killer by survivorship or (a remedy that

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<sup>5</sup> Liebman, *supra* note 3, at 827.

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> See PROPERTY RESTATEMENT, *supra* note 4, at cmts. a, b.

<sup>8</sup> *Id.* at cmt. j; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 cmt. j (Tentative Draft No. 3, 2001).

<sup>9</sup> See PROPERTY RESTATEMENT, *supra* note 4, at cmts. o and q.

<sup>10</sup> See *id.* cmts. j-n, p.

<sup>11</sup> See *id.* Reporter's Note No. 8.

yields the same result) by treating the killing as effecting a severance of the joint tenancy.”<sup>12</sup> Kull’s position is to the contrary, or, more specifically, that the victim’s estate takes the whole of the property by right of survivorship (unless there is some further equitable justification for effecting a severance of the joint tenancy).<sup>13</sup>

Our purpose here is not to revisit the merits of the two positions, but to emphasize that we never recommended that the Institute adopt a rule that “a murderer be able to inherit from his or her victim.”<sup>14</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> The Kull motion is reproduced in the Reporter’s Note. *See id.* Reporter’s Note No. 8.

<sup>14</sup> *See supra* note 4 and accompanying text.



# How the ALI's *Restatement Third of Property* is Influencing the Law of Trusts and Estates

Lawrence W. Waggoner<sup>†</sup>

Restatements, once limited to restating existing law, are now substantially devoted to law reform. The ALI's website states its law-reform policy thus: "The American Law Institute is the leading independent organization in the United States producing scholarly work to *clarify, modernize, and otherwise improve the law*."<sup>1</sup>

In 2014, the *Brooklyn Law Review* published a symposium issue on Restatements of the Law.<sup>2</sup> A paper in that symposium argued against the ALI's law-reform policy.<sup>3</sup> The

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<sup>†</sup> Lewis M. Simes Professor Emeritus of Law, University of Michigan; Reporter, Restatement (Third) of Property: Wills and Other Donative Transfers. I thank John Langbein for commenting on an earlier draft.

<sup>1</sup> *ALI Overview*, ALI: THE AMERICAN LAW INSTITUTE, <http://www.ali.org/index.cfm?fuseaction=about.overview> (last visited Oct. 29, 2014) (emphasis added).

<sup>2</sup> Symposium, *Restatement of . . .*, 79 BROOK. L. REV. 381 (2014).

<sup>3</sup> Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681 (2014). The authors discussed four discrete Restatements of Property: RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT (1977), RESTATEMENT (THIRD) OF PROP.: MORTGAGES (1997), RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000), and RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS (volumes released in 1999, 2003, 2011). *Id.* at 690-91, 693-95. The latter is the largest and most recently published of the four. It has three volumes, eight divisions, 27 chapters, 135 sections, more than 1100 lettered comments, and 1468 pages (not counting tables and indices).

The Merrill-Smith complaints come from the perspective of property-law teachers and some of them have nothing to do with the Donative-Transfers project. But some of their complaints do relate to the Donative-Transfers project, and, as the Reporter for that project, I wish to respond to their claim that that project has lost influence in the development of the law. I would add that the Landlord-and-Tenant, Mortgages, and Servitudes projects cover real-estate topics, are properly located under the Restatement of Property umbrella, and are within the expertise of property-law teachers. The ALI has in fact recently announced that it will begin work in 2015 on a Restatement (Fourth) of Property, but that project will be limited to real-estate topics. See Press Release, American Law Institute, The American Law Institute Announces Four New Projects, *available at* <http://www.ali.org/email/pr-14-11-17.html>.

Donative Transfers is a trusts-and-estates topic and is within the expertise of trusts-and-estates scholars. Donative Transfers could therefore logically be a separate Restatement and be titled the Restatement of Wills and Other Donative

authors specifically speculated that the reformist rather than restatist character of the recently completed *Restatement (Third) of Property: Wills and Other Donative Transfers*<sup>4</sup> (Property Restatement) has “very likely” caused that Restatement to lose influence—be ignored—in the development of the law.<sup>5</sup>

Before expressing such a harsh judgment,<sup>6</sup> one would expect the authors to have examined the statutory and case law, as well as the trusts-and-estates scholarly literature, to see if there is any evidence that supports their case. They did not. Instead, they based their claim of irrelevancy on the ALI’s royalties from Westlaw downloads as compared to royalties from the Restatements of Torts and Contracts.<sup>7</sup> Although the authors cite no comparisons based on dollars and cents, the fact is that royalties for downloads is a superficial measure of the impact of a Restatement. More important is what the downloaders do with the downloads.

The law of trusts-and-estates has long been in need of substantial reform. This short essay serves as an interim report on how the Property Restatement is contributing to that effort<sup>8</sup> and, in the process, refutes the claim that the

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Transfers. Because the future Property Restatement Fourth will be limited to real-estate topics, the Property Restatement Third on Wills and Other Donative Transfers will not be affected by the Fourth and hence the Third will continue to represent the position of the ALI for the wills-and-other-donative-transfers topic.

<sup>4</sup> RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS (2011); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS (2003); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS (1999) [hereinafter PROPERTY RESTATEMENT].

<sup>5</sup> Merrill & Smith, *supra* note 3, at 682. (“Perhaps most critically, the *Second* and *Third Restatements of Property* have been given over to campaigns for legal reform, often entailing the repudiation of earlier volumes of the Restatement, which has very likely undermined the utility and the credibility of the ALI’s effort.”). For a similar point of view regarding Restatements in general, and § 39 of the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011) in particular, see the opinion of Justice Scalia, in *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part) (“Over time, the Restatements’ authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be . . . . Restatement sections such as [§ 39] should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar.”). Justice Scalia’s statement about the weight to be given to a Restatement section ignores the deliberative processes of the ALI that every Restatement section goes through before it becomes final. See *Overview: How ALI Works*, ALI, <http://www.ali.org/index.cfm?fuseaction=about.instituteworks> (last visited Feb. 25, 2015).

<sup>6</sup> Not to be overlooked is the willfully hostile subtitle the authors chose for their article: “The *Disintegration* of the Restatement of Property.” Merrill & Smith, *supra* note 3, at 681 (emphasis added).

<sup>7</sup> *Id.* at 681-82.

<sup>8</sup> See generally John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1 (2012); Lawrence W. Waggoner, *What’s in the*

Restatement's reformist character has undermined its importance. The Property Restatement's influence extends to all three pillars of law reform: uniform laws, decisional law, and legal scholarship.

## I.        INFLUENCING UNIFORM LAWS

There has been significant cross-fertilization between the Property Restatement and uniform laws dealing with trusts-and-estates.<sup>9</sup>

*Unifying the Law of Probate and Nonprobate Transfers.* Although probate and nonprobate transfers occur at death and thus are functionally equivalent, the law has historically applied different rules to these categories. One of the broad themes of reforming the law of trusts-and-estates is to unify the law of probate and nonprobate transfers, so that the same rules apply to both.<sup>10</sup> The Property Restatement and the Uniform Probate Code (UPC) embrace that theme in various manifestations. For example, the law has historically held that divorce presumptively revokes provisions in a will in favor of the former spouse but has not applied the same divorce-revocation rule to nonprobate transfers such as revocable trusts or life insurance. In an important reformist move, the Property Restatement and the UPC extend the divorce-revocation rule to nonprobate transfers.<sup>11</sup>

*Class Gifts.* Division V of the Property Restatement, consisting of four chapters and 19 sections, contains a comprehensive treatment of class gifts, especially addressing the newly emerged question of the rights of children of assisted reproduction to participate as class members. Class gifts are widely

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*Third and Final Volume of the New Restatement of Property that Estate Planners Should Know About*, 38 ACTEC L.J. 23 (2012). The Langbein and Waggoner articles are also available at <http://ssrn.com/abstract=2291160>.

<sup>9</sup> See Lawrence W. Waggoner, *Why I Do Law Reform*, 45 U. MICH. J.L. REFORM 727, 731-36 (2012), available at <http://ssrn.com/abstract=2231637>.

<sup>10</sup> See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

<sup>11</sup> See PROPERTY RESTATEMENT, *supra* note 4, § 4.1; UNIF. PROBATE CODE § 2-804 (amended 2010). In *Hillman v. Maretta*, 133 S. Ct. 1943 (2013), and *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), the Supreme Court thwarted the achievement of that goal for federally regulated or created nonprobate transfers. See John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665, 1666-88, 1694-96 (2014); Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*, 67 VAND. L. REV. 1635, 1638-42 (2014).



used in estate planning documents. The Uniform Law Commission (ULC) codified Division V in the Uniform Probate Code.<sup>12</sup>

*Powers of Appointment.* Division VI of the Property Restatement, consisting of seven chapters and 42 sections, contains a comprehensive treatment of powers of appointment. Powers of appointment are central to estate planning practice. The ULC codified Division VI in the Uniform Powers of Appointment Act.<sup>13</sup>

*Reformation to Correct Mistakes.* The law historically has authorized courts to reform *inter vivos* donative documents, but not wills, to correct mistaken terms.<sup>14</sup> Section 12.1 of the Property Restatement adopts a reformation doctrine for wills as well as for other donative transfers. The ULC codified that Restatement provision in the UPC and the Uniform Trust Code (UTC).<sup>15</sup> In North Dakota, a state that has enacted the UTC reformation provision, the state supreme court in *In re Matthew Larson Trust Agreement*,<sup>16</sup> noted that the Comment to the UTC reformation provision states that the provision was copied from the Property Restatement's reformation provision. The court then proceeded to quote extensively and with

<sup>12</sup> UNIF. PROBATE CODE §§ 2-115 to -122, 2-705; see also Sheldon F. Kurtz & Lawrence W. Waggoner, *The Uniform Probate Code Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC L.J. 30 (2009), available at <http://ssrn.com/abstract=1477961>; Lawrence W. Waggoner, *Class Gifts under the Restatement (Third) of Property* (Univ. of Mich. Pub. Law & Legal Theory Research Paper, No. 266, 2012), available at <http://ssrn.com/abstract=2006627>.

In *Astrue v. Capato*, 132 S. Ct. 2021 (2012), the Supreme Court upheld the Social Security Administration's interpretation of § 416 of the Social Security Act as requiring that state intestacy laws, despite being nonuniform, control the right of posthumously conceived children of assisted reproduction (ART children) to Social Security survivor benefits. See Waggoner, *supra* note 11, at 1658-62. In *Mattison v. Soc. Sec. Comm'r*, 825 N.W.2d 566 (Mich. 2012), the Michigan Supreme Court held that ART children born to the decedent's widow are not entitled to take by intestacy under Michigan law (and hence not entitled to Social Security survivor benefits). *Id.* at 570. The *Mattison* decision prompted the Council of the Probate and Estate Planning Section of the State Bar of Michigan to appoint a committee to study enactment of the UPC provisions dealing with ART children. Full disclosure: I am a member of that committee.

<sup>13</sup> The Prefatory Note to the Uniform Powers of Appointment Act states: "A comprehensive restatement of the law of powers of appointment was approved in 2010 and published in 2011 by the American Law Institute. See chapters 17-23 of the Restatement Third of Property: Wills and Other Donative Transfers. This act draws heavily on that Restatement." NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM POWERS OF APPOINTMENT ACT 1 (2013), available at [http://www.uniformlaws.org/shared/docs/Powers\\_of\\_Appointment/2013\\_UPAA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Powers_of_Appointment/2013_UPAA_Final.pdf).

<sup>14</sup> See John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982).

<sup>15</sup> UNIF. PROBATE CODE § 2-805 (2014); UNIF. TRUST CODE § 415 (amended 2010); see also John H. Langbein & Lawrence W. Waggoner, *Curing Execution Errors and Mistaken Terms in Wills* (Univ. of Mich. Pub. Law & Legal Theory Research Paper, No. 207, 2010), available at <http://ssrn.com/abstract=1653438>.

<sup>16</sup> 831 N.W.2d 388, 394 (N.D. 2013).

approval from the Property Restatement's Comments and Illustrations.<sup>17</sup> In 2014, the Internal Revenue Service issued private letter rulings accepting the validity for tax purposes of UTC mistake-correcting reformatations.<sup>18</sup>

*Modification to Achieve the Donor's Tax Objectives.* Section 12.2 of the Property Restatement adopts a tax-motivated modification doctrine for wills as well as for other donative documents. The ULC codified that Restatement provision in the UPC and the UTC.<sup>19</sup> In 2014, the Internal Revenue Service issued private letter rulings accepting the validity for tax purposes of UTC tax-motivated modifications.<sup>20</sup>

*Premarital and Marital Agreements.* Section 9.4 of the Property Restatement on premarital and marital agreements regarding the surviving spouse's elective-share and other rights provides—for the first time to my knowledge—that financial disclosure is not sufficient for the agreement to be enforceable. Informed consent also requires disclosure of the legal rights that the spouse or spouse-to-be is forgoing by signing the agreement. The ULC adopted that position in the Uniform Premarital and Marital Agreements Act.<sup>21</sup>

## II. INFLUENCING DECISIONAL LAW

The Property Restatement has also had considerable influence with litigants seeking to change existing law or make new law and ultimately with the courts in embracing the Restatement's proposals.<sup>22</sup> It is important to point out that the

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<sup>17</sup> *Id.* at 394-95, 397, 399 (quoting and applying PROPERTY RESTATEMENT, *supra* note 4, § 12.1).

<sup>18</sup> See I.R.S. Priv. Ltr. Rul 151442-13 (June 18, 2014); I.R.S. Priv. Ltr. Rul 151441-13 (June 18, 2014), I.R.S. Priv. Ltr. Rul 151440-13 (June 18, 2014), I.R.S. Priv. Ltr. Rul 151439-13 (June 18, 2014), I.R.S. Priv. Ltr. Rul 151438-13 (June 18, 2014).

<sup>19</sup> UNIF. PROBATE CODE § 2-806 (2014); UNIF. TRUST CODE § 416 (amended 2010).

<sup>20</sup> See I.R.S. Priv. Ltr. Rul 151442-13 (June 18, 2014); I.R.S. Priv. Ltr. Rul 151441-13 (June 18, 2014), I.R.S. Priv. Ltr. Rul 151440-13 (June 18, 2014), I.R.S. Priv. Ltr. Rul 151439-13 (June 18, 2014), I.R.S. Priv. Ltr. Rul 151438-13 (June 18, 2014).

<sup>21</sup> See UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9 (2012).

<sup>22</sup> Only two cases, to my knowledge, have rejected a Property Restatement's reformist initiative: one a four-two decision on the reformation of wills, *Flannery v. McNamara*, 738 N.E.2d 739, 745 (Mass. 2000), and the other on the inclusion of property subject to a general power of appointment for purposes of the elective share of the surviving spouse, *Bongaards v. Millen*, 793 N.E.2d 335, 347 (Mass. 2003). For criticism of *Flannery*, see Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. & TR. J. 357, 400 (2004). Dissenting in *Bongaards*, Chief Justice Marshall said: "I dissent from so much of the court's opinion as indulges in the criticism of, or forecloses in any respect our subsequent consideration of, the recently approved § 9.1(c) of the Restatement (Third) [of Property: Wills and Other Donative Transfers]." *Bongaards*, 793 N.E.2d at 354 (Marshall, C.J., concurring in part and dissenting in part). Also, in *In re Estate of Phillips*, No. 01-0879, 2002 WL 1447482, at \*1-

following list does not include case law with routine citations to the Restatement in support of existing law.<sup>23</sup> Here, then, is a list of decisions, compiled in alphabetical order by jurisdiction, in which the court changed existing law or made new law on the basis of the Property Restatement:

*Ruotolo v. Tietjen*.<sup>24</sup> The court adopted the Property Restatement's position that mere survival language does not trump an antilapse statute, saying: "In sum, we agree with [the Property Restatement]." <sup>25</sup>

*Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*.<sup>26</sup> The court, in a tax reformation case, adopted the Property Restatement's position that a mistake of law, as well as of fact, can be the basis for reforming a provision in a testamentary trust, saying: "We adopt the [Property] Restatement[s] view on this subject."<sup>27</sup>

*University of Southern Indiana Foundation v. Baker*.<sup>28</sup> The court abandoned the distinction between types of ambiguity in construing instruments, saying: "We agree with [the Property Restatement] and [other] authorities that the latent/patent distinction . . . no longer serves any useful purpose."<sup>29</sup>

*Sieh v. Sieh*.<sup>30</sup> The court adopted the Property Restatement's position that the value of property owned or owned in substance by the decedent is subject to the forced share of the surviving spouse, even when the forced-share

2 (Iowa Ct. App. July 3, 2002), an unpublished opinion, the court declined to adopt the harmless-error rule of PROPERTY RESTATEMENT § 3.3 on the ground that adopting such a view was a matter for the legislature.

<sup>23</sup> For citations of that sort, see, e.g., *Morse v. Kraft*, 992 N.E.2d 1021, 1024, 1026-27 (Mass. 2013), which cites PROPERTY RESTATEMENT § 10.2 cmt. g and § 17.1 cmt. g with approval, *BankBoston v. Marlow*, 701 N.E.2d 304, 306 (Mass. 1998), which cites PROPERTY RESTATEMENT § 12.2 with approval, and *Miller v. Commonwealth of Pennsylvania*, 84 A.3d 620, 624-25 (Pa. 2012), which adopts PROPERTY RESTATEMENT § 7.1's definition of "will substitute."

Two additional decisions cite and adopt PROPERTY RESTATEMENT § 12.1 on reformation on the ground of mistake: *Estate of Irvine v. Oaas*, 309 P.3d 986, 990 (Mont. 2013), and *In re Irrevocable Trust Agreement of 1979*, 331 P.3d 881, 888 (Nev. 2014). Although these are cases of first impression in their jurisdictions, the donative documents in question were *inter vivos*, not wills, so I have not listed these cases in Part II as adopting the Property Restatement's reformation doctrine for wills.

<sup>24</sup> 890 A.2d 166 (Conn. App. Ct. 2006), *aff'd per curiam*, 916 A.2d 1 (Conn. 2007).

<sup>25</sup> 890 A.2d at 177 (quoting and applying PROPERTY RESTATEMENT, *supra* note 4, § 5.5).

<sup>26</sup> 895 N.E.2d 1191 (Ind. 2008).

<sup>27</sup> *Id.* at 1200 (quoting and applying PROPERTY RESTATEMENT, *supra* note 4, § 12.1).

<sup>28</sup> 843 N.E.2d 528 (Ind. 2006).

<sup>29</sup> *Id.* at 535 (quoting and applying PROPERTY RESTATEMENT, *supra* note 4, §§ 10.2, 11.1).

<sup>30</sup> 713 N.W.2d 194 (Iowa 2006).

statute refers only to the probate estate, saying: “We adopt the view of the American Law Institute on this issue.”<sup>31</sup>

*In re Estate of Beauregard*.<sup>32</sup> The court adopted the Property Restatement’s position that preponderance of the evidence, not clear and convincing evidence, is the proper standard of proof for rebutting the presumption that a lost will that is traced to the testator’s possession was revoked by act, saying: “We follow the [Property] Restatement . . . on this point, for the reasons [there] explained.”<sup>33</sup>

*In re Griffin Revocable Grantor Trust*.<sup>34</sup> The court, on “the basis of [the Property Restatement and other] authorities,” concluded that “while [the Michigan statute on no-contest clauses] does not apply to trusts, it reflects this state’s public policy that no-contest clauses in trust agreements are unenforceable if there is probable cause for challenging the trust.”<sup>35</sup> Later in the opinion, the court adopted the Property Restatement’s definition of probable cause.<sup>36</sup>

*Magnuson v. Diekmann*.<sup>37</sup> The court said: “Because Minnesota caselaw on reformation pertains to contractual rather than donative instruments, we turn to [the Property Restatement for guidance].”<sup>38</sup> The court then quoted and applied several provisions of that Restatement dealing with reforming a donative document to effect the donor’s intention.<sup>39</sup>

*In re Martin B.*<sup>40</sup> The court, in a case of first impression, held that the terms “issue” and “descendants” in trusts include children conceived posthumously by means of assisted reproduction, saying: “The rationale of the [Property] Restatement . . . should be applied here.”<sup>41</sup>

<sup>31</sup> *Id.* at 197-98 (quoting and applying PROPERTY RESTATEMENT, *supra* note 4, § 9.1(c) & cmt. j). The Iowa legislature subsequently rendered the forced share ineffective by expressly limiting the nonprobate transfers subject to the spouse’s share to one type—revocable *inter vivos* trusts. See IOWA CODE § 633.238 (2009); *In re Estate of Myers*, 825 N.W.2d 1 (Iowa 2012).

<sup>32</sup> 921 N.E.2d 954 (Mass. 2010).

<sup>33</sup> *Id.* at 958 n.5 (quoting and applying PROPERTY RESTATEMENT, *supra* note 4, § 4.1); see also *id.* at 957 n.4.

<sup>34</sup> 760 N.W.2d 318 (Mich. Ct. App. 2008).

<sup>35</sup> *Id.* at 322 (quoting and applying PROPERTY RESTATEMENT, *supra* note 4, § 8.5 cmt. i).

<sup>36</sup> *Id.* at 323.

<sup>37</sup> 689 N.W.2d 272 (Minn. Ct. App. 2004).

<sup>38</sup> *Id.* at 274.

<sup>39</sup> *Id.* at 275 (quoting and applying PROPERTY RESTATEMENT, *supra* note 4, §§ 10.1, 10.2, and 12.1).

<sup>40</sup> 841 N.Y.S.2d 207 (Surr. Ct. 2007).

<sup>41</sup> *Id.* at 211 (quoting and applying PROPERTY RESTATEMENT, *supra* note 4, § 14.8). On November 21, 2014, New York Governor Andrew Cuomo signed a bill designed to diminish the possibility that a posthumously conceived child of assisted reproduction can qualify as a

*In re Estate of Herceg*.<sup>42</sup> The court adopted the Property Restatement's position that a will can be reformed on the ground of mistake, saying: "[I]t seems logical to this court to choose the path . . . recommended by the [Property] Restatement . . ."<sup>43</sup>

See also *In re Matthew Larson Trust Agreement*, *supra*.<sup>44</sup>

### III. INFLUENCING LEGAL SCHOLARSHIP

The Property Restatement is also influencing the third pillar of law reform—legal scholarship. Just about every trusts-and-estates law review article published lately cites the Restatement for one or more propositions.<sup>45</sup> The trusts-and-estates casebooks are replete with full-section extracts from, and other references to, the Restatement.<sup>46</sup> A statutory supplement that is widely adopted for classroom use reproduces provisions of the Restatement alongside provisions of the UPC and, where relevant, other uniform laws dealing with trusts and estates.<sup>47</sup>

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beneficiary of a trust. The new legislation will also necessitate significant attorney involvement in order for such a child to benefit. The statute's stringent requirements relate to high-formality documentary evidence of the deceased genetic parent's consent to allow posthumous conception, post-death recordation of the decedent's written consent, and post-death delivery by the prospective birth mother of written notice of possible use of the decedent's genetic material for conception. The statute also imposes constrictive time limits for post-death conception or birth. Finally, for wills or trusts that became effective before September 1, 2014, as well as for decedents who died intestate before that date, the statute only allows a child to take from the deceased genetic parent, not from an ancestor or any other relative of the deceased genetic parent. See N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2014). In a report issued after the bill passed the Assembly, the Association of the Bar of the City of New York urged the governor to sign it into law. The City Bar's report praised the bill's effect of "limiting" the number of posthumously conceived children who will qualify as trust beneficiaries. See New York City Bar, *Report on Legislation by the Trusts, Estates and Surrogate's Courts Committee* 1, 5 (July 2014), <http://www2.nycbar.org/pdf/report/uploads/20072610-PosthumouslyConceivedChildren.pdf>.

<sup>42</sup> 747 N.Y.S.2d 901 (Surr. Ct. 2002).

<sup>43</sup> *Id.* at 905 (quoting and applying PROPERTY RESTATEMENT, *supra* note 4, § 12.1).

<sup>44</sup> See *supra* notes 16-17 and accompanying text.

<sup>45</sup> See, e.g., John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335 (2013); Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769 (2014).

<sup>46</sup> See, e.g., JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS AND ESTATES* (9th ed. 2013); THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS AND FUTURE INTERESTS* (5th ed. 2011).

<sup>47</sup> See THOMAS P. GALLANIS, *UNIFORM TRUST AND ESTATE STATUTES* (2014-15 ed. 2014).

## CONCLUSION

The Property Restatement has influenced and is influencing the law of trusts and estates. Its influence extends to all three pillars of law reform: uniform laws, decisional law, and legal scholarship. Any claim to the contrary is demonstrably false.



# NOTES

## An Unconstitutional Playbook

### WHY THE NCAA MUST STOP MONITORING STUDENT-ATHLETES' PASSWORD-PROTECTED SOCIAL MEDIA CONTENT

#### INTRODUCTION

Social media use has increased exponentially in the past few years. Twitter and Facebook have controlled much of the social media market share and dominate this continuously growing landscape.<sup>1</sup> Since its launch in March 2006,<sup>2</sup> Twitter has amassed about 1 billion subscribers and is used by approximately 100 million people everyday.<sup>3</sup> The social media site is “a real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting.”<sup>4</sup> The service is used by people for business and pleasure, and allows users to freely share their thoughts and emotions via short updates, or “Tweets.”<sup>5</sup> Users may shield their Tweets from public view by making them private and limiting visibility only to users’ approved followers.<sup>6</sup> Similarly, Facebook was founded on February 4, 2004, with the “mission . . . to give people the power to share and make the

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<sup>1</sup> *Most Popular Social Media Websites in the United States in September 2014, Based on Share of Visits*, STATISTA, <http://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/> (last visited May 1, 2015).

<sup>2</sup> Nicholas Carlson, *The Real History of Twitter*, BUSINESS INSIDER (Apr. 13, 2011, 1:30 PM), <http://www.businessinsider.com/how-twitter-was-founded-2011-4>.

<sup>3</sup> Craig Smith, *By The Numbers: 250+ Amazing Twitter Statistics*, DIGITAL MARKETING RAMBLINGS, <http://www.expandedramblings.com/index.php/march-2013-by-the-numbers-a-few-amazing-twitter-stats/> (last updated Jan. 3, 2015).

<sup>4</sup> *Getting Started on Social Media*, STANFORD+CONNECTS, <https://stanfordconnects.stanford.edu/get-started/social-media> (last visited Nov. 14, 2014).

<sup>5</sup> *New User FAQs*, TWITTER, <https://support.twitter.com/groups/50-welcome-to-twitter/topics/203-faqs/articles/13920-new-user-faqs> (last visited May 1, 2015).

<sup>6</sup> *Id.*



world more open and connected.”<sup>7</sup> The site currently has an estimated 864 million active users each day, even surpassing the amount on Twitter.<sup>8</sup> Facebook allows users to find and add their friends by sending and accepting “friend requests.”<sup>9</sup> Users may also alter their privacy settings to decide to whom their posts, photos, or information is visible, or even whether the general public can find the existence of their page.<sup>10</sup> As a result, it is no surprise that a prevalent group among the social media lovers using Twitter and Facebook are American high school students. However, this use of social media may not be allowed if you are one of those students lucky enough to be offered a collegiate scholarship for athletics.

In order to play football at Florida State University, prior to the 2012 season students were forced to give up all use of their Twitter accounts “in order to keep them from embarrassing the program.”<sup>11</sup> Similarly, Boise State coach Chris Petersen demanded that his football players refrain from all use of Twitter for the duration of the 2012 season.<sup>12</sup> Sweeping bans are not the only means which universities and individual teams have resorted to when it comes to restricting the social media access of their student-athletes. Athletes at schools including the University of Kentucky and the University of Louisville are subject to constant monitoring of their Facebook and Twitter accounts conducted by third parties employed by the universities.<sup>13</sup> In 2012, the athletic director of University of Oklahoma admitted that “the university required its athletes to

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<sup>7</sup> *About Facebook*, FACEBOOK, <https://www.facebook.com/facebook/info> (last visited May 1, 2015).

<sup>8</sup> Craig Smith, *By The Numbers: 170 Amazing Facebook User & Demographic Statistics*, DIGITAL MARKETING RAMBLINGS, <http://expandedramblings.com/index.php/by-the-numbers-17-amazing-facebook-stats/#.VFPm3010zc> (last updated May 1, 2015).

<sup>9</sup> *Finding Friends*, FACEBOOK, <https://www.facebook.com/help/www/336320879782850/> (last visited May 1, 2015); *Adding Friends & Friend Requests*, FACEBOOK, <https://www.facebook.com/help/www/146466588759199> (last visited May 1, 2015).

<sup>10</sup> *Basic Privacy Settings & Tools*, FACEBOOK, <https://www.facebook.com/help/www/325807937506242/> (last visited May 1, 2015).

<sup>11</sup> Kristian Dyer, *Florida State Bans Its Players From Twitter*, YAHOO! SPORTS (July 20, 2012, 6:26 PM), <http://sports.yahoo.com/blogs/dr-saturday/florida-state-bans-players-twitter-222622167--ncaaf.html>.

<sup>12</sup> Paul Steinbach, *Schools Attempting to Control Athletes' Use of Social Media*, ATHLETIC BUSINESS (Oct. 2012), <http://www.athleticbusiness.com/schools-attempting-to-control-athletes-use-of-social-media.html>.

<sup>13</sup> Mark Boxley, *University of Kentucky, Louisville Monitor Athletes' Tweets*, USA TODAY (Aug. 20, 2012, 2:46 PM), <http://usatoday30.usatoday.com/sports/college/story/2012-08-20/University-of-Kentucky-and-University-of-Louisville-student-athletes-monitored-on-Twitter/57165704/1>.

friend coaches on Facebook.”<sup>14</sup> Later in the year, it was reported that Utah State University even went as far as “forcing athletes to allow school officials access to their private accounts.”<sup>15</sup>

Once a student is forced to register his username with the school and the monitoring company installs the application, their account may be considered seized for constitutional purposes, as the student’s Fourth Amendment rights may have been violated.<sup>16</sup> Similarly, a mandatory Facebook friend request can be compared to a school demanding a search of the student’s account, and may also be a violation of the Constitution.<sup>17</sup> Students are forced to submit their account to an ongoing search by someone from whom they should have the right to remain private.

Recently, many have questioned the constitutionality of these restrictions and systems of monitoring.<sup>18</sup> Courts have weighed in on several issues relating to social media, and thus far have held that First Amendment protection does extend to speech on social media.<sup>19</sup> It can be extremely difficult, however, to determine when actions taken by universities cross the line and become an invasion of the student-athletes’ constitutionally protected rights. For example, some schools employ companies to monitor student-athletes’ social media counts.<sup>20</sup> Companies such as Varsity Monitor and UDiligence have prospered as schools across the country call on them to “keep[] an online eye on their athletes.”<sup>21</sup> These companies offer customized levels of monitoring of the student-athletes’ social media feeds to meet the requests of the university.<sup>22</sup> Their services usually involve the installation of software to the athlete’s social media accounts, which in turn allows the company to access and monitor the accounts.<sup>23</sup>

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<sup>14</sup> Pete Thamel, *Tracking Twitter, Raising Red Flags*, N.Y. TIMES (Mar. 30, 2012), [http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?pagewanted=all&_r=0).

<sup>15</sup> Kellie Woodhouse, *University of Michigan Athletes Sign Social Media Policy in Bid to Avoid Controversy As Twitter Incidents Multiply*, ANN ARBOR NEWS (Oct. 29, 2012), <http://www.annarbor.com/news/as-twitter-incidents-multiply-michigan-athletes-sign-social-media-contract-and-try-to-avoid-controve/>.

<sup>16</sup> Bradley Shear, *Are UDiligence and Varsity Monitor Advising NCAA Schools to Violate the Stored Communications Act?*, SHEAR ON SOCIAL MEDIA LAW (May 18, 2012), <http://www.shearsocialmedia.com/2012/05/is-varsity-monitor-and-udiligence.html>.

<sup>17</sup> *Id.*

<sup>18</sup> See Thamel, *supra* note 14.

<sup>19</sup> See *infra* Part IV.A.

<sup>20</sup> Thamel, *supra* note 14.

<sup>21</sup> *Id.*

<sup>22</sup> Boxley, *supra* note 13.

<sup>23</sup> *Id.*

This note argues that the National Collegiate Athletic Association (NCAA) must adopt a new social media policy outlawing the use of monitoring systems and mandatory friend requests, because the current system inappropriately encourages schools to engage in conduct that may violate the constitutional and legal rights of their students. Part I of this note will introduce the state of social media monitoring at universities and will discuss its impact on NCAA student-athletes. Part II details the methods that universities are using to restrict the social media privacy of their student-athletes. It will also explore the use of third-party social media monitoring systems and mandatory Facebook friend requests by coaches or other school officials, as well as the issue of universities using unconstitutional methods to secure the consent of student-athletes to have their accounts monitored in these ways. This note suggests that the duress suffered by students is what ultimately compels them to oblige, which renders the consent illegal and invalid.<sup>24</sup> Part III looks at the constitutional implications of this monitoring, and explains why the NCAA's current system allows for potential violations of both the First and Fourth Amendments by public universities. Part IV discusses the current legal atmosphere regarding this issue, and shows how federal courts have already ruled to protect constitutional rights in the social media platform. Further, it will examine the legislative actions taken by states to protect the privacy of students' social media accounts. Part V will consist of a brief discussion to show how universities risk exposing themselves to liability issues if they continue to engage in student monitoring. Part VI concludes that the NCAA should create a new bylaw to its manual that builds a social media policy for all universities and their athletes to follow, and specifically prohibits schools from stripping athletes of their privacy by demanding them to perform certain actions on their social media accounts.

I. THE CURRENT STATE OF SOCIAL MEDIA MONITORING IN THE NCAA

A. *The Problem*

Currently, each university is responsible for setting its own social media policies, and choosing its own methods of

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<sup>24</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 233 (1973).

policing and enforcing these policies.<sup>25</sup> While “the NCAA does not require its member schools to monitor social media accounts of student[-]athletes[,]” it does “encourage[] schools to do so.”<sup>26</sup> Many schools, including the University of Georgia, do not even apply their social media restrictions evenly across student-athletes, but rather only to members of select teams.<sup>27</sup> This lack of uniformity allows athletic directors and coaches to take whatever measures of social media monitoring and restricting they so choose. If the school chooses a method such as installing monitoring software or demanding a Facebook friend request, it may be violating several constitutional rights,<sup>28</sup> including freedom of speech and freedom “against unreasonable searches and seizures.”<sup>29</sup> Those schools that choose to utilize a third-party monitoring company appear to be practicing a system that may be unconstitutional and has been likened to using “an online bug.”<sup>30</sup> The school may obtain the student’s consent, seemingly removing it from any constitutional liability; however, these acts of consent may have been acquired involuntarily, and perhaps even through coercion.<sup>31</sup> Because “the consent was not given voluntarily,” it may be invalid as a violation of the student’s constitutional rights under the Fourth Amendment.<sup>32</sup> Finally, the current system opens the door to an immense number of problems for the universities, including potential liability for missing a crime,<sup>33</sup> or for leaking “student athletes’ personal information.”<sup>34</sup> These methods can actually come back to hurt the schools themselves and, accordingly, they would be wise to stay away from these methods for their own protection.<sup>35</sup>

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<sup>25</sup> See Matt Dunning, *Social Media Has Schools on Defense*, BUSINESS INSURANCE (July 24, 2011, 6:00 AM), <http://www.businessinsurance.com/article/20110724/NEWS07/307249975>.

<sup>26</sup> *Id.*

<sup>27</sup> Rex Santus, *Social Media Monitoring Widespread Among College Athletic Departments, Public Records Survey Shows*, STUDENT PRESS LAW CTR. (Mar. 16, 2014, 8:00 PM), <http://www.splc.org/article/2014/03/social-media-monitoring-widespread-among-college-athletic-departments-public-records-survey-shows>.

<sup>28</sup> Shear, *supra* note 16.

<sup>29</sup> U.S. CONST. amend. IV.

<sup>30</sup> Boxley, *supra* note 13.

<sup>31</sup> See *infra* Part III.C.

<sup>32</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 248-49 (1972).

<sup>33</sup> Bradley Shear, *New Jersey Bans NCAA Social Media Monitoring Companies*, SHEAR ON SOCIAL MEDIA LAW (Aug. 29, 2013), <http://www.shearsocialmedia.com/search?updated-max=2013-08-30T00:02:00-04:00&max-results=5>.

<sup>34</sup> Boxley, *supra* note 13.

<sup>35</sup> This note will not delve into these liability issues at length, but will briefly bring them up to show how dangerous these policies are for universities.

## B. *The Solution*

Ultimately, the ideal solution for the NCAA is to recant its encouragement of universities to engage in social media monitoring.<sup>36</sup> The NCAA is at the center of the issue, as it is allowing social media monitoring through its decisions to encourage the policy rather than penalize it. As a result, the NCAA must implement a brand new social media policy through the creation of a specific bylaw to deal with, and create penalties for, social media monitoring. The NCAA can follow the University of Michigan and create a “Social Media Agreement” that all players must sign.<sup>37</sup> This new policy should apply universally to each of the NCAA’s member institutions. Doing so will help close the door on the extreme amount of variety in the way each NCAA school and team handles its athletes with regards to social media. This policy would be very straightforward and would help educate and guide student-athletes about the best ways to use social media. The NCAA must ensure that this policy sets guidelines for the student-athletes that can help them maintain successful social media accounts on their own, free from any university supervision. In addition, one way for the NCAA to feel more comfortable about its athletes’ Twitter accounts could be to ask them to include a brief disclaimer in their account bio. This would alert the athlete’s followers that the account represents the views of the individual and is in no way associated with the university.

Most importantly, the policy must limit the monitoring power of public universities and, alternatively, prevent them from forcing athletes to accept Facebook friend requests from coaches, or turnover their username or password. One way the NCAA can do this is by outlawing the same practices that some state legislatures have already banned. For example, the state of Arkansas enacted H.B. 1902 in 2013.<sup>38</sup> The bill “prohibit[s] an institution of higher education from requiring or requesting a current or prospective employee or student from disclosing his or her username or password for a social media account.”<sup>39</sup> In addition, the NCAA must take heed of judicial decisions that are giving social media users a wide range of protection, based in the First and Fourth Amendments, and the Stored Communications

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<sup>36</sup> See, e.g., Dunning, *supra* note 25 (discussing possible risks for schools that monitor the social media accounts of its athletes).

<sup>37</sup> Woodhouse, *supra* note 15.

<sup>38</sup> H.B. 1902, 89th Gen. Assemb. (Ark. 2013).

<sup>39</sup> *Id.* (capitalization omitted).

Act. The NCAA can do so by telling its member institutions that in order to enforce any restrictions on a student's social media account, the student must first engage in conduct that would lead to "substantial disruption"<sup>40</sup> to the university. Furthermore, since the Stored Communications Act prevents individuals from using third-party applications or forcing students to friend a coach to bypass privacy settings,<sup>41</sup> the NCAA must prevent its universities from doing the same. The NCAA should announce clearly, via a new bylaw, that both of these monitoring methods are strictly prohibited, and no longer can any NCAA school or team implement these broad-sweeping requirements. The NCAA must not wait for other states or the federal government to act, but should instead be proactive and take action to increase its reputation and level of accountability.

Next, the NCAA must ensure the effectiveness of the new measures it takes, and that its member schools take them seriously. The NCAA enforces rule violations by its student-athletes by serving them with suspensions, rendering them ineligible to compete in a specified number of games.<sup>42</sup> In addition, the NCAA often penalizes the school itself for violations committed by student-athletes, taking away wins, championships, bowl eligibility, or scholarships.<sup>43</sup> Two of the major ways that the NCAA polices schools for these violations are through schools self-reporting them,<sup>44</sup> and the use of an 18-member "infractions committee."<sup>45</sup> Since it would seem unlikely that schools would expose themselves to these harsh penalties by "self-reporting" themselves for violating the new social

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<sup>40</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (discussing the standard necessary for school officials to prohibit a student's First Amendment right to freedom of expression or speech).

<sup>41</sup> Stored Communications Act, 18 U.S.C. §§ 2701-12 (2002); see also *infra* Part IV.B.

<sup>42</sup> See, e.g., *Half-Game Penalty for Johnny Manziel*, ESPN (Aug. 29, 2013, 12:41 PM), [http://espn.go.com/college-football/story/\\_/id/9609389/johnny-manziel-texas-aggies-suspended-1st-half-season-opener-rice-owls](http://espn.go.com/college-football/story/_/id/9609389/johnny-manziel-texas-aggies-suspended-1st-half-season-opener-rice-owls); *Kansas' Naadir Tharpe Suspended 1 Game for NCAA Violation*, USA TODAY (Oct. 29, 2013, 11:35 PM), <http://www.usatoday.com/story/sports/ncaab/big12/2013/10/29/kansas-jayhawks-naadir-tharpe-suspended-1-game/3311227/> [hereinafter *Kansas' Naadir Tharpe*]; Andy Katz, *Artis, Carter Banned 9 Games*, ESPN (Nov. 7, 2013, 8:24 PM), [http://espn.go.com/mens-college-basketball/story/\\_/id/9943201/oregon-ducks-dominic-artis-ben-carter-suspended-9-games](http://espn.go.com/mens-college-basketball/story/_/id/9943201/oregon-ducks-dominic-artis-ben-carter-suspended-9-games).

<sup>43</sup> See, e.g., Gary Klein, *NCAA Hands USC Two-Year Bowl Game Ban, Major Scholarship Reduction in Football*, L.A. TIMES (June 9, 2010), <http://articles.latimes.com/2010/jun/09/sports/la-sp-usc-20100610>; Lynn Zinser, *Memphis Stripped of 2008 Final Four by N.C.A.A.*, N.Y. TIMES (Aug. 20, 2009), [http://www.nytimes.com/2009/08/21/sports/ncaabasketball/21memphis.html?\\_r=0](http://www.nytimes.com/2009/08/21/sports/ncaabasketball/21memphis.html?_r=0).

<sup>44</sup> See *Kansas' Naadir Tharpe*, *supra* note 42; see also Katz, *supra* note 42.

<sup>45</sup> *New NCAA Enforcement Structure Takes Effect*, USA TODAY (Aug. 1, 2013, 3:41 PM), <http://www.usatoday.com/story/sports/college/2013/08/01/ncaa-new-enforcement-structure-takes-effect/2609185/>.

media policy, the NCAA must ensure that its “infractions committee” is prepared to handle the responsibility. The committee has been pondering the idea of adding even more members to its staff,<sup>46</sup> and with the recent explosion of social media issues, it would be a good idea for them to do so. The larger the size of the committee, the more members the NCAA can dedicate to enforcing its new social media policy, and thus the more effective it will be. Finally, because of the constitutional issues implemented, a breach of the NCAA’s new social media policy should fall under the infraction category of a “serious breach of conduct.”<sup>47</sup> By being placed in this category, schools using social media monitoring tactics will be subject to the most severe penalties, including the ability of the “infractions committee” to suspend coaches “up to one full season.”<sup>48</sup> If these recommendations are followed, the NCAA will have a strong new policy that it can implement to solve the problem of teams monitoring the social media accounts of their student-athletes. In sum, these actions will help close the door on the potential illegal monitoring and simultaneously help protect the NCAA and its member institutions from liability.

## II. HOW UNIVERSITIES ARE MONITORING STUDENTS’ SOCIAL MEDIA ACCOUNTS

### A. *Social Media Monitoring Companies and Their Clients*

Two of the companies involved in the social media monitoring business are Varsity Monitor and UDiligence.<sup>49</sup> Both of these companies use similarly designed software to monitor the activity of student-athletes on various social media sites, including Facebook and Twitter.<sup>50</sup> The software is installed in the athletes’ social media accounts, and sends “email[] alerts to coaches whenever athletes use a word that could embarrass the student, the university or tarnish their images on services such as Twitter, Facebook, YouTube and MySpace.”<sup>51</sup> The software typically “gives [the monitoring] company access to every bit of information on the account—

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Myron Medcalf, *Policing the Social Media Craze*, ESPN (May 1, 2012, 3:53 PM), [http://espn.go.com/mens-college-basketball/story/\\_/id/7876754/policing-social-media-craze-college-sports-ncb](http://espn.go.com/mens-college-basketball/story/_/id/7876754/policing-social-media-craze-college-sports-ncb).

<sup>50</sup> *Id.*

<sup>51</sup> Boxley, *supra* note 13.

whether or not it is password protected/private information.”<sup>52</sup> The extent of this information is great and it includes items such as the student’s “[e]mail address, phone number, birth date, posts, pictures, videos, friend lists, relationships, [and] calendar of events.”<sup>53</sup> Because of the way these programs work, some have referred to the services as “cyberstalking software.”<sup>54</sup>

Each school can customize its own list of words that will trigger these alerts being sent.<sup>55</sup> One example of this comes from the University of Louisville, which in late 2012 had over 400 trigger words, mostly “hav[ing] to do with drugs, sex, or alcohol.”<sup>56</sup> As of August 2012, the client list of UDiligence included the University of Louisville, “LSU, Ole Miss, Texas Tech, Utah State, Texas A&M, Texas, Baylor, University of Florida, New Mexico and Missouri.”<sup>57</sup> Varsity Monitor clients have included the Universities of North Carolina, Oklahoma, and Nebraska.<sup>58</sup> More schools, including Auburn, Mississippi State and South Carolina have used the services of other monitoring companies.<sup>59</sup> An exact client list is difficult to confirm because these companies no longer have client lists displayed on their websites.<sup>60</sup> Both the University of North Carolina and Utah State University no longer use these services, as their states have enacted legislation that protects the privacy of students’ social media accounts and in doing, has effectively banned them.<sup>61</sup> Further, Texas A&M’s Athletic Director recently denied using any monitoring service.<sup>62</sup>

The NCAA’s current policy leaves it to each individual school to decide what social media policy, if any, to impose and gives complete discretion to the schools to decide which of their athletic teams should be subjected to the provisions of the

<sup>52</sup> Kevin DeShazo, *Is Monitoring Student-Athletes on Social Media Illegal?*, <http://kevindeshazo.tumblr.com/post/50661117318/is-monitoring-student-athletes-on-social-media-illegal> (last visited May 1, 2015).

<sup>53</sup> *Id.*

<sup>54</sup> Bradley Shear, *Right to Privacy Will Be Protected By the Social Networking Online Protection Act*, SHEAR ON SOCIAL MEDIA LAW (Feb. 18, 2013), <http://www.shearsocialmedia.com/2013/02/right-to-privacy-will-be-protected-by.html>.

<sup>55</sup> *See* Boxley, *supra* note 13.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See* Thamel, *supra* note 14.

<sup>59</sup> Boxley, *supra* note 13.

<sup>60</sup> Shear, *supra* note 16.

<sup>61</sup> H.B. 846, Gen. Assemb., 2013-2014 Sess. (N.C. 2013); H.B. 100, 2013 Gen. Sess. (Utah 2013).

<sup>62</sup> Jody Serrano, *Universities Might Have to Limit Monitoring, Set Social Media Policies in Stone Under Proposal*, STATESMAN (Feb. 10, 2013, 5:08 PM), <http://www.statesman.com/news/news/local-education/universities-might-have-to-limit-monitoring-set-so/nWLNq/>.



school's policies.<sup>63</sup> For example, at the University of Kentucky, every student-athlete is required to use the service.<sup>64</sup> However, the University of Florida has chosen "to monitor only [its] football players."<sup>65</sup> This further complicates the issue and creates a wide range of disparity not only amongst each institution, but also amongst each team at the same institution.

### B. *Mandatory Facebook Friend Requests*

The other procedure used to oversee an athlete's social media activity requires that the student accept a Facebook friend request from a coach or other school official. This policy has admittedly been used by large NCAA schools such as the University of Oklahoma.<sup>66</sup> According to an NBC News report in 2012, "[s]tudent-athletes in colleges around the country also are finding out they can no longer maintain privacy in Facebook communications because schools are requiring them to 'friend' a coach or compliance officer, giving that person access to their 'friends-only' posts."<sup>67</sup> The effect of this demand is that, "if you want to play, you have to friend a coach."<sup>68</sup>

Like the installation of monitoring software, this method completely takes away the athlete's choice and right to the privacy of his password-protected content. Facebook is designed to allow users complete control and customizability over the privacy of their accounts.<sup>69</sup> Users can determine who can see their information, posts, and photos, and even limit who can find their account.<sup>70</sup> However, once athletic departments force monitoring systems onto student-athlete's accounts, or demand students to accept the friend request of a coach or administrator, athletic departments are no longer giving the athletes a choice as to the privacy controls of their accounts.

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<sup>63</sup> See Thamel, *supra* note 14; Pete Warner, *NCAA Has Limited Stance on Student-Athletes' Use of Social Media*, BANGOR DAILY NEWS (Jan. 17, 2014, 7:05 PM), <http://bangordailynews.com/2014/01/17/sports/ncaa-has-limited-stance-on-student-athletes-use-of-social-media/>.

<sup>64</sup> See Boxley, *supra* note 13.

<sup>65</sup> See Thamel, *supra* note 14.

<sup>66</sup> *Id.*

<sup>67</sup> Bob Sullivan, *Govt. Agencies, Colleges Demand Applicants' Facebook Passwords*, NBC NEWS (Mar. 6, 2012), <http://www.nbcnews.com/technology/govt-agencies-colleges-demand-applicants-facebook-passwords-328791?franchiseSlug=technolog>.

<sup>68</sup> *Id.*

<sup>69</sup> See *Basic Privacy Settings & Tools*, FACEBOOK, <https://www.facebook.com/help/325807937506242> (last visited May 1, 2015).

<sup>70</sup> See *Privacy*, FACEBOOK, <https://www.facebook.com/help/445588775451827> (last visited May 1, 2015).

### III. HOW UNIVERSITIES' ACTIVITIES ARE UNCONSTITUTIONAL

#### A. *The First Amendment*

The case of *Tinker v. Des Moines Independent Community School District* established that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>71</sup> The Court developed the “substantial and material disruption”<sup>72</sup> test and found that a school may not prevent a student from exercising these First Amendment rights unless his or her conduct “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.”<sup>73</sup> *Tinker* allows student-athletes at public institutions to take the first step in contesting the NCAA’s current policy, as they can make the claim that their social media speech has First Amendment protection. *Tinker*, however, is distinguishable from the present issue as none of the contesting plaintiffs were older than the age of high school students.<sup>74</sup> Despite the dissimilar factual context, the strong First Amendment principles of *Tinker* have been expanded in recent case law and are a solid basis from which student-athletes can mount a legal challenge to university monitoring policies.

Three years after *Tinker*, the Supreme Court erased all doubt of whether First Amendment protection of students would extend to those in college.<sup>75</sup> Students at Central Connecticut State College (CCSC) “desired to form a local chapter of Students for a Democratic Society (SDS)” on campus.<sup>76</sup> When they attempted to register with the college and obtain “official recognition as a campus organization,” the school’s President denied the request.<sup>77</sup> Although the students’ application had made a showing that their viewpoint deserved a say at the college, “the Young Americans for Freedom, the Young Democrats, the Young Republicans, and the Liberal Party all enjoyed recognized status,”<sup>78</sup> the President still denied their request. While the group vowed that they would not be

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<sup>71</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>72</sup> The Court in *Tinker* does not refer to the test by this name, but later courts have commonly used this title. See, e.g., Dina Harris & Yonit Kovnator, *Courts Confirm Discipline for Off-Campus Speech Must Meet the “Tinker” Test*, MARTINDALE.COM (Sept. 21, 2011), [http://www.martindale.com/education-law/article\\_Best-Best-Krieger-LLP\\_1346822.htm](http://www.martindale.com/education-law/article_Best-Best-Krieger-LLP_1346822.htm).

<sup>73</sup> *Tinker*, 393 U.S. at 509.

<sup>74</sup> *Id.* at 504.

<sup>75</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>76</sup> *Id.* at 170.

<sup>77</sup> *Id.* at 170, 172, 174.

<sup>78</sup> *Id.* at 174.

controlled by the National SDS group, and did not share in many of their goals,<sup>79</sup> the President was concerned that the group would not be independent.<sup>80</sup> In analyzing the constitutionality of the college's decision, the Court stated, "At the outset we note that state colleges and private universities are not enclaves immune from the sweep of the First Amendment."<sup>81</sup> The Court added that, "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."<sup>82</sup> The case affirmed that the *Tinker* test for material disruption is the correct standard to determine the constitutionality of a school's action, even at the college level.<sup>83</sup> "[I]f there were an evidentiary basis to support the conclusion that CCSC-SDS posed a substantial threat of material disruption in violation of that command[,] the President's decision should be affirmed."<sup>84</sup> The Court ultimately remanded the case for a determination of that matter.<sup>85</sup>

Monitoring the accounts of student-athletes in order to prevent them from using certain words or phrases appears to be a clear violation of the rights afforded in *Tinker* and extended to college students in *Healy*. Bradley Shear, an attorney who specializes in the field of social media law, says that, "You cannot create a prior restraint on your students because they may do something or say something that may create embarrassment (for) your [institution.]"<sup>86</sup> In Kentucky, the American Civil Liberties Union (ACLU) has even begun to take a look at the effect of social media monitoring on students' First Amendment rights.<sup>87</sup> Regarding the matter, the ACLU stated that:

When students are forced, as a condition of receiving a scholarship, to grant government officials access to all of their social networking accounts and then are subject to punishment for engaging in lawful

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<sup>79</sup> *Id.* at 173.

<sup>80</sup> *Id.* at 175.

<sup>81</sup> *Id.* at 180.

<sup>82</sup> *Id.* at 180-81 (citation omitted).

<sup>83</sup> *Id.* at 189.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 194.

<sup>86</sup> Joe Utter & Adam Lewis, *WSU Coach Mike Leach's Ban of Twitter Raises Concerns From Legal Experts*, SEATTLE TIMES (Oct. 24, 2012, 2:15 PM), [http://seattletimes.com/html/take2/2019510389\\_taketwo24.html](http://seattletimes.com/html/take2/2019510389_taketwo24.html) (first alteration in original).

<sup>87</sup> Boxley, *supra* note 13.

speech that the university simply doesn't like, we believe public universities cross the line.<sup>88</sup>

The current way that monitoring products are used seems to give them the effect of a “disciplinary tool,”<sup>89</sup> which punishes students by restricting their rights to the freedoms of speech and expression. According to *Tinker*, prohibiting these rights is unconstitutional unless the students’ conduct meets the “materially disruptive” standard. Embarrassment for the institution would not seem to rise to meet this standard and according to the Court, even “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>90</sup> If a star college athlete tweeted a racist remark, the argument could be made that the level of embarrassment to the institution would materially disrupt the education environment. However, even if some tweets could be materially disruptive, a blanket policy would be over-inclusive and unconstitutional because it would prohibit, on balance, much more protected speech than unprotected speech. As a result, the NCAA’s lack of a uniform social media policy allows its member institutions to take away the First Amendment protection that the American judiciary has explicitly extended to students of public universities.

*B. The Fourth Amendment and the Stored Communications Act*

By monitoring social media, universities not only risk violating the First Amendment, but risk violating the Fourth Amendment as well. The Fourth Amendment to the United States Constitution safeguards the people “against unreasonable searches and seizures” unless the government makes a showing of “probable cause.”<sup>91</sup> In addition, the Stored Communications Act “grant[s] individuals a right to privacy in their electronic communications that supplements the protections already contained within the Fourth Amendment.”<sup>92</sup> The Act gives

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<sup>88</sup> *Id.*

<sup>89</sup> David J. Leonard, *Athletic Programs’ Twitter Jitters*, CHRONICLE OF HIGHER EDUCATION (Feb. 25, 2013), <http://chronicle.com/blogs/conversation/2013/02/25/athletic-programs-twitter-jitters/>.

<sup>90</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

<sup>91</sup> U.S. CONST. amend. IV.

<sup>92</sup> Troutman Sanders LLP, *The Stored Communications Act Can’t Make Public Tweets Private*, INFORMATION INTERSECTION (Aug. 30, 2012), <http://www.informationintersection.com/2012/08/the-stored-communications-act-cant-make-public-tweets-private/>.

“individuals . . . a civil cause of action when their electronic information is disclosed in violation of the [Act].”<sup>93</sup> As a result, these laws often work in tandem.<sup>94</sup>

Although the Fourth Amendment was created to safeguard against law enforcement officials, the “Court has never limited the Amendment’s prohibition on unreasonable searches and seizures to operations conducted by the police.”<sup>95</sup> The Court also stated that, “It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”<sup>96</sup> A later example of the Court applying the Fourth Amendment to conduct by those other than law enforcement officers can be found when the Supreme Court specifically held that the Fourth Amendment’s protection against “unreasonable searches and seizures” does indeed apply to those “conducted by public school officials.”<sup>97</sup> The Court articulated the standard to follow in determining whether the search is constitutional, as one that “should depend simply on the reasonableness, under all the circumstances, of the search.”<sup>98</sup> To determine whether the nature of the search was reasonable, the Court has set forth a two-step process, asking “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>99</sup>

Social media monitoring does not seem to rise to the necessary level to be considered a reasonable search under the circumstances. Schools are searching student-athletes’ accounts in an extremely broad way and it is doubtful that a court would hold that this practice is “justified at its inception.”<sup>100</sup> Maryland Senator Ronald N. Young has likened social media monitoring to the unconstitutional practices of “reading [someone’s] mail or listening to [someone’s] phone calls.”<sup>101</sup> Young believes that it is a constitutional violation for schools to demand access to their student-athlete’s accounts by having them “give up their

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *N.J. v. T.L.O.*, 469 U.S. 325, 335 (1985).

<sup>96</sup> *Camara v. Mun. Ct. of the City & Cnty. of S.F.*, 387 U.S. 523, 530 (1967).

<sup>97</sup> *N.J. v. T.L.O.*, 469 U.S. at 333.

<sup>98</sup> *Id.* at 341.

<sup>99</sup> *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).

<sup>100</sup> *Id.* at 20.

<sup>101</sup> Thamel, *supra* note 14.

password or user name.”<sup>102</sup> Further, Bradley Shear, the aforementioned social media attorney asks, “[W]ould it be acceptable for schools to require athletes to bug their off-campus apartments? Does a school have a right to know who all your friends are?”<sup>103</sup> Once a student is compelled to register his username with the school and the monitoring company installs the application, their account is being constantly searched under the Constitution. As a result, school administrators are thereby violating their privacy rights. Similarly, a mandatory Facebook friend request can be compared to demanding a search of the student’s account. Students are forced to submit their account to an ongoing search by someone from whom they should have the right to remain private.

### C. *Counterarguments and the Issue of Consent*

Several counterarguments should be examined regarding the unconstitutionality of the current system. The first argument is that, when schools request only usernames but not passwords, they are obtaining access to information that is already available to the public at large.<sup>104</sup> However, “[m]embers generally publish information they want to share to their personal profile, and the information is thereby broadcasted to the members’ online ‘friends’ (i.e., other members in their online network).”<sup>105</sup> The social media monitoring systems do away with the requirement that you must be a user to log on and view others’ information and posts. The information is not in the public domain, but rather available for other users with permission to access it (in the “online network” of the user). As a result, the monitoring company is more like an outside bug being installed on the account. The school would not otherwise have access to the athletes’ account but, similar to a hacker, the monitoring company breaks the rules and gets them in anyway. This goes back to the question of whether it is “reasonable” for the schools to do this and conduct a constant search of the student-athlete’s accounts. Perhaps if a specific athlete has done something to raise suspicions, then the school could have a case to monitor his account, but there is no basis for a school to

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<sup>102</sup> *Id.*

<sup>103</sup> Sullivan, *supra* note 67.

<sup>104</sup> See DeShazo, *supra* note 52.

<sup>105</sup> Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012).

claim that it needs sweeping access to monitor an entire team or athletic department of students.

A second argument is that schools already monitor student-athletes in other ways, such as drug testing. However, social media monitoring is distinguishable from drug testing because, while the content that the NCAA searches for through the process of drug testing is illegal, that is not the case with social media monitoring.<sup>106</sup> The California Supreme Court has ruled that “[t]he NCAA’s drug testing program does not violate the state constitutional right to privacy.”<sup>107</sup> However, the court found it significant that the plaintiffs did “not contend that the purpose or objectives of the NCAA are contrary to law or public policy.”<sup>108</sup> On the other hand, the issue of monitoring social media accounts could be against both law and public policy. While there is no inherent legal right to maintain a social media account, many courts have already held that social media users should be afforded a high level of constitutional protection and have explicit First and Fourth Amendment protection.<sup>109</sup> Further, because the drugs that the NCAA tests for are indeed illegal, there was no way for the plaintiffs to argue that public policy favored their right to be protected from a search. However, with millions around the world using social media as a means of free expression, public policy would not seem to favor NCAA institutions taking this right away in a sweeping manner just to guard against the chance of one or more students making a comment that harms the school’s reputation. Finally, the practice of drug testing student-athletes survived legal challenge because drugs have a direct effect on the outcome of NCAA events. “[T]he NCAA’s decision to enforce a ban on the use of drugs by means of a drug testing program is reasonably calculated to further its legitimate interest in maintaining the integrity of intercollegiate athletic competition.”<sup>110</sup> The NCAA’s decision to drug test is used directly to enforce one of its most important rules and keep illegal substances from compromising the integrity of its various sports. “[Athletic] competition should be decided on the basis of who has done the best job of perfecting and utilizing his or her natural abilities, not on the basis of who has the best

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<sup>106</sup> Thamel, *supra* note 14.

<sup>107</sup> Hill v. Nat’l Collegiate Athletic Ass’n., 865 P.2d 633, 669 (Cal. 1994).

<sup>108</sup> *Id.* at 660.

<sup>109</sup> See *infra* Part IV.

<sup>110</sup> Hill, 865 P.2d at 660.

pharmacist.”<sup>111</sup> On the other hand, there is no correlation between a student’s social media account use and his or her on-field performance or the integrity of the sport. Thus, the NCAA would not be able to make any of the same arguments that it made to defend its use of drug testing as a proper means of enforcing a rule, and not as a reasonable search.

The final, and perhaps strongest counterargument, is that schools are not in danger of committing any constitutional violation here since the student-athletes themselves are consenting to these monitoring methods. Before a school official or coach can become Facebook friends with a student-athlete, the student-athlete must accept the other party’s friend request. As a result, it would seem that the student has consented to the search of his account. If this were true, then there would be no issue of constitutionality, as “a search authorized by consent is wholly valid.”<sup>112</sup> Similarly, when a public school decides to use a third-party monitoring service to monitor the student’s account, the school may argue that there was consent from the student because he turned over his username and/or password and thus gave permission for the installation of the software. However, “[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.”<sup>113</sup> The Supreme Court spelled out what is required to show “that a consent was ‘voluntarily’ given,”<sup>114</sup> determining that it “is a question of fact to be determined from the totality of all the circumstances.”<sup>115</sup> The Court added that the interpretation of “voluntariness” in this sphere of the law should be the same as the conventional “definition of ‘voluntariness.’”<sup>116</sup> According to the Merriam-Webster dictionary, “voluntary” can be defined as “done or given because you want to and not because you are forced to” or “having power of free choice.”<sup>117</sup>

In the context of student-athletes “consenting” to the monitoring of their accounts, there seems to be a valid claim

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<sup>111</sup> *Id.* (alteration in original) (internal quotation marks omitted) (citing Eric D. Zemper, *Drug Testing in Athletics*, in *DRUG TESTING: ISSUES & OPTIONS* 120 (Coombs & West, eds. 1991)).

<sup>112</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

<sup>113</sup> *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

<sup>114</sup> *Schneckloth*, 412 U.S. at 222.

<sup>115</sup> *Id.* at 227.

<sup>116</sup> *Id.* at 229.

<sup>117</sup> *Voluntary*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/voluntary> (last visited May 1, 2015).



that the consent was not “voluntarily given,” as required by the Court.<sup>118</sup> Using the Court’s “totality of all the circumstances” test,<sup>119</sup> there is a strong argument that the “traditional definition of voluntariness” is not met when student-athletes consent to the monitoring of their accounts.<sup>120</sup> As Bob Sullivan stated in a special report for NBC News, “[f]or student athletes . . . the access isn’t voluntary. No access, no sports.”<sup>121</sup> For student-athletes who have worked hard their entire lives to get to where they are in their sport, and have earned a full scholarship to college, it does not seem like they have much of a “free choice” because their other option will take away so much from them and could change their lives for the worse. Exercising the “choice” not to participate in social media monitoring would spark a long and consequential chain for the student-athletes: they would not be allowed to play sports and that would lead them to being kicked off the team and losing their scholarship. Without the scholarship, many student-athletes would not have been able to attend college and have the chance for a life-changing experience.<sup>122</sup> After working so hard to get to this point, and playing with a dream of the pros and supporting your family, how else is an 18 year-old student supposed to respond when put in this situation except to give consent? The Court held that the “possibly vulnerable subjective state of the person who consents” must be taken into account as well in testing if the consent was voluntary.<sup>123</sup> It seems like that would be a factor here as the average student-athlete, who is young and controlled in so many ways by the university, may be taken advantage of and thus be the type of person who is considered vulnerable.

The NCAA must act to prevent universities from taking advantage of their position of power over young student-athletes, and coercing student-athletes to consent to unconstitutional acts. It does appear that the consent is typically involuntary, and thus invalid, so the acts by the schools are unconstitutional.<sup>124</sup> By not creating a uniform social media policy, the NCAA is turning a blind eye and allowing

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<sup>118</sup> *Schneekloth*, 412 U.S. at 222.

<sup>119</sup> *Id.* at 223.

<sup>120</sup> *Id.* at 248.

<sup>121</sup> Sullivan, *supra* note 67.

<sup>122</sup> See Jordan Moore, *USC Athletic Director Addresses Hot-Button Topics in College Sports*, USC NEWS (June 6, 2014), <https://news.usc.edu/63826/usc-athletic-director-addresses-hot-button-topics-in-college-sports/>.

<sup>123</sup> *Schneekloth*, 412 U.S. at 229.

<sup>124</sup> See *id.* at 233.

potential constitutional violations to take place, instead of taking accountability and doing something to protect its students' rights.

#### IV. CHANGES IN THE LAW THAT REFLECT THE NEED FOR CHANGE

##### A. *The Judiciary Gives Constitutional Protection to Facebook Users*

American courts have evolved in order to properly protect the rights of their citizens from circumstances unforeseen by the founders. One of the areas in which courts have made the most adjustments relates to stretching the First Amendment to cover appropriate electronic violations of the present-day digital age. An example of this can be seen in *R.S. v. Minnewaska Area Sch. Dist.*, which involved the punishment of a student for posts she made outside of school “on her Facebook wall.”<sup>125</sup> The plaintiff initially made a comment on Facebook that she hated another student and she was given detention after someone notified the principal of the post.<sup>126</sup> Later, the plaintiff wrote another post expressing a great amount of anger that someone told the principal.<sup>127</sup> This time, she was suspended for one day and prevented from joining the rest of her class on a ski trip.<sup>128</sup> The court held that the school violated the student’s First Amendment rights by punishing her for the Facebook post that she made. As the court explained:

Such statements are protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment and are so egregious as to pose a serious safety risk or other substantial disruption in that environment. R.S.’s Facebook wall postings were not true threats or threats of any kind.<sup>129</sup>

The decision recognized that courts are faced with new obstacles due to the present-day popularity of speech being broadcasted electronically on the Internet by students.<sup>130</sup> Importantly, the court held that this “transition has not abrogated

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<sup>125</sup> R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1133 (D. Minn. 2012).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1133-34.

<sup>128</sup> *Id.* at 1134.

<sup>129</sup> *Id.* at 1140 (emphasis omitted).

<sup>130</sup> *Id.* at 1139.

the clearly established general principles [of First Amendment free speech] which have governed schools for decades.”<sup>131</sup>

This case shows that even though Facebook may be a very different forum than in-person speech, First Amendment protections will still apply. A student may have just as much of a right to speak his mind on Facebook and be protected as when speaking inside the classroom. According to the court, the material disruption standard will apply in either event, and if the speech or conduct does not meet the disruptive standard, then the First Amendment prevents the school from prohibiting it.<sup>132</sup> Similarly, universities should not monitor the accounts of student-athletes in a way that would restrict their freedom of speech, unless the statement disrupts the classroom. As a result, the NCAA should enact a social media policy that reflects this notion and does not allow schools to get involved in the students’ accounts unless they have caused a disruption.

In addition to punishing her for First Amendment protected speech on Facebook, the school also made the plaintiff in *R.S.* turn over her account information so that they could search it.<sup>133</sup> “Feeling threatened” and not sure what else to do, the plaintiff complied with the demand.<sup>134</sup> The court held that “R.S.’s posting on her Facebook wall was intended to be accessible by her Facebook ‘friends,’ but not by members of the general public.”<sup>135</sup> As such, she “had a reasonable expectation of privacy to her private Facebook information.”<sup>136</sup>

Similarly, when schools use social media monitoring tactics, they are obtaining information that is not meant to be accessible to anyone except the student-athletes’ social media friends and followers. Student-athletes at public institutions are similar to the plaintiff in the *Minnewaska* case in the sense that they have First Amendment rights against state actors, and have the same expectation of privacy that universities want to transgress. Also like the plaintiff in *Minnewaska*, student-athletes may feel threatened by the fear of losing their scholarship and acquiesce to the demand because they have no other option. All of this adds up to a Fourth Amendment violation by a university and it is mainly due to the NCAA’s

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1140.

<sup>133</sup> *Id.* at 1134.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1133.

<sup>136</sup> *Id.* at 1142.

refusal to step in and set a policy to avoid the potential for these issues.

*B. The Stored Communications Act*

The Stored Communications Act (SCA or the Act) also provides protection to social media users. The Act provides that anyone who “(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be” subject to a fine or imprisonment.<sup>137</sup> There are several cases that show how the Act has been used to help protect social media rights. In *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, the plaintiff was suspended from work after her managers received word of a controversial post she made on her private Facebook wall.<sup>138</sup> The court used the Stored Communications Act to analyze the issue: “[T]he SCA covers: (1) electronic communications, (2) that were transmitted via an electronic communication service, (3) that are in electronic storage, and (4) that are not public. Facebook wall posts that are configured to be private meet all four criteria.”<sup>139</sup> The court stated that:

Facebook allows users to select privacy settings for their Facebook walls. Access can be limited to the user’s Facebook friends, to particular groups or individuals, or to just the user. The Court finds that, when users make their Facebook wall posts inaccessible to the general public, the wall posts are ‘configured to be private’ for purposes of the SCA. The Court notes that when it comes to privacy protection, the critical inquiry is whether Facebook users took steps to limit access to the information on their Facebook walls.<sup>140</sup>

Similarly, the critical inquiry for determining whether social media monitoring systems and mandatory friend requests violate the SCA must come down to the same question. If users are making their accounts private, and the schools would not otherwise have access to them, then the school cannot use third-party applications or force students to

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<sup>137</sup> Stored Communications Act, 18 U.S.C. § 2701 (2002) (unlawful access to stored communications).

<sup>138</sup> *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 662-63 (D.N.J. 2013).

<sup>139</sup> *Id.* at 667.

<sup>140</sup> *Id.* at 668.

friend a coach to bypass these privacy settings. “This decision is a huge victory for privacy because it recognizes that employers and schools may not require employees and/or students to turn over their digital user names, passwords, or password protected digital content.”<sup>141</sup>

In October 2013, a federal court extended its greatest level of protection to Facebook users yet. In *Bland v. Roberts*, the U.S. Court of Appeals for the Fourth Circuit held that even pressing the “Like” button on Facebook is considered speech protected by the First Amendment.<sup>142</sup> According to Facebook’s website, “The Like button is the quickest way for people to share content with their friends. A single click on the Like button will ‘like’ pieces of content on the web and share them on Facebook.”<sup>143</sup> In effect, the “Like” button allows a user to share a thought or expression simply by the click of a button, without typing a single word.<sup>144</sup> The court held that there is no “constitutional significance” to the difference between “a user . . . us[ing] a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes.”<sup>145</sup> This extension shows the ever-growing protections being afforded to social media users as courts continue to view the Constitution as protecting new rights in the digital age that comport with the intent of the Framers. Constitutional protection for social media users is growing everyday and with this case the courts have extended that protection even further than before.

### C. State Legislative Actions

Judicial action has not been the only type of response relating to the issue of social media as protected speech. Many states have resorted to legislative actions to protect students from being subjected to social media monitoring tactics. In 2012, California,<sup>146</sup> Delaware,<sup>147</sup> Michigan<sup>148</sup> and New Jersey<sup>149</sup>

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<sup>141</sup> Bradley Shear, *NJ Federal Court: Password Protected Facebook Posts Covered By Stored Communications Act*, SHEAR ON SOCIAL MEDIA LAW (Aug. 30, 2013), <http://www.shearsocialmedia.com/2013/08/nj-federal-court-non-public-facebook.html>.

<sup>142</sup> *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).

<sup>143</sup> *Like Button for the Web*, FACEBOOK DEVELOPERS, <https://developers.facebook.com/docs/plugins/like-button/> (last visited May 1, 2015).

<sup>144</sup> *Like*, FACEBOOK, <https://www.facebook.com/help/like> (last visited May 1, 2015).

<sup>145</sup> *Bland*, 730 F.3d at 386.

<sup>146</sup> S.B. 1349, 2011-12 Leg., Reg. Sess. (Ca. 2012).

<sup>147</sup> H.B. 309, 146th Gen. Assemb., Reg. Sess. (Del. 2012).

<sup>148</sup> H.B. 5523, 96th Leg., Reg. Sess. (Mich. 2012).

<sup>149</sup> A.B. 2879, 215th Leg., Reg. Sess. (N.J. 2012).

enacted laws “that prohibit[] requesting or requiring a[] . . . student or applicant to disclose a user name or password for a personal social media account.”<sup>150</sup> In 2013, five other states (Arkansas,<sup>151</sup> New Mexico,<sup>152</sup> Oregon,<sup>153</sup> Utah,<sup>154</sup> and Vermont<sup>155</sup>) joined them, raising the total to nine states that have effectively outlawed the practice of requiring a student to disclose his social media username to a school for the purposes of monitoring.<sup>156</sup> Further, in 2014, four more states (Louisiana,<sup>157</sup> Maine,<sup>158</sup> Rhode Island,<sup>159</sup> and Wisconsin<sup>160</sup>) signed bills into law. The topic remains relevant, as other states have followed suit and introduced legislation of their own to protect the social media privacy rights of students.<sup>161</sup> However, the NCAA continues to fall behind and has taken no action to ensure that those students playing for universities outside of these states are also protected from social media monitoring.

California’s Act states that the Legislature intends “to protect the privacy rights of students at California’s postsecondary educational institutions.”<sup>162</sup> The bill actually points out that it was enacted because of new challenges presented by “quickly evolving technologies and social media services and Internet Web sites.”<sup>163</sup> It thus appears that the bill was created specifically to respond to the issue of social media monitoring by educational institutions. The Arkansas bill is specifically subtitled: “To prohibit an institution of higher education from requiring or requesting a current or prospective employee or student from disclosing his or her username or password for a social media account.”<sup>164</sup> This Arkansas bill specifically outlaws what many NCAA teams are doing, thus making it illegal to do so for all universities in the state of

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<sup>150</sup> *Employer Access to Social Media Usernames and Passwords*, NAT’L CONF. OF STATE LEG., <http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx> (last visited May 1, 2015).

<sup>151</sup> H.B. 1902, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

<sup>152</sup> S.B. 422, 2013 Leg., Reg. Sess. (N.M. 2013).

<sup>153</sup> S.B. 344, 77th Leg., Reg. Sess. (Or. 2013).

<sup>154</sup> H.B. 100, 2013 Leg., Gen. Sess. (Utah 2013).

<sup>155</sup> S.7, 2013-14 Leg., Reg. Sess. (Vt. 2013).

<sup>156</sup> *Employer Access to Social Media Usernames and Passwords*, *supra* note 150.

<sup>157</sup> H.B. 340, 2014 Leg., Reg. Sess. (La. 2014).

<sup>158</sup> H.B. 838, 126th Leg., 2nd Reg. Sess. (Me. 2014).

<sup>159</sup> H.B. 7124, 2014 Leg., Reg. Sess. (R.I. 2014).

<sup>160</sup> S.B. 223, 101st Leg., Reg. Sess. (Wis. 2014).

<sup>161</sup> *Id.*

<sup>162</sup> S.B. 1349, 2011-12 Leg., Reg. Sess. (Cal. 2012).

<sup>163</sup> *Id.*

<sup>164</sup> H.B. 1902, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (original in capital letters).

Arkansas.<sup>165</sup> A school in that state cannot ask a student-athlete to provide it with his Twitter username for the purpose of installing monitoring software, or for any other reason.<sup>166</sup> Altogether, these enacted state bills show that the NCAA is exposing its member institutions to liability by failing to set a social media policy preventing schools from engaging in this conduct. Instead, the NCAA continues to leave the responsibility to set school social media policies up to each individual school, which for now means that unless a student is in one of the minority states that has enacted a law, he or she may be subjected to this monitoring. The fact that more and more states have taken action over the last two years is a warning sign to the NCAA that it should take action to promote uniform protections for student-athletes' social media expression. While states have recognized that in the changing times of the digital age it is important to extend statutory protection to social media users, the NCAA refuses to adapt along with them.

*D. Social Networking Online Protection Act*<sup>167</sup>

In addition to legislation at the state level, a bill has been reintroduced by the House of Representatives that would have the same protective effect, but on a national scale.<sup>168</sup> The Social Networking Online Protection Act (SNOPA) is “designed to protect the digital privacy of . . . students . . . in the Social Media Age.”<sup>169</sup> “If SNOPA is enacted students will not have to worry about being required to provide access to their personal digital accounts in order to attend the school of their dreams or keep their scholarships.”<sup>170</sup> Specifically, the bill states that:

The institution will not—(i) require or request that a student or potential student provide the institution with a user name, password, or any other means for accessing a private email account of the student or potential student or the personal account of the student or potential student on any social networking website . . . .<sup>171</sup>

In addition, the bill prohibits institutions from enacting any type of discipline against students who refuse to comply

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<sup>165</sup> See *id.*

<sup>166</sup> See *id.* at § 1(a)(3)(C).

<sup>167</sup> Social Networking Online Protection Act, H.R. 537, 113th Cong. (2013).

<sup>168</sup> Kevin DeShazo, *Debate Heats Up Over Social Media Privacy of Student Athletes*, FIELDHOUSE MEDIA (Apr. 10, 2013), <https://fieldhousemedia.squarespace.com/blog/debate-heats-up-over-social-media-privacy-of-student-athletes>.

<sup>169</sup> Shear, *supra* note 54.

<sup>170</sup> *Id.*

<sup>171</sup> H.R. 537 § 3(A)(i).

with a request to provide coaches or school administrators access to their social media account.<sup>172</sup> This part of the Act deals with the coercion factor mentioned previously in this Note,<sup>173</sup> and shows that it is a real issue. Unlike the NCAA's current system, the Act allows students to say no to social media monitoring without any fear that they will face consequences from the school, such as being dismissed from the team or expelled from the university.<sup>174</sup>

However, the bill does not seem to be a pressing focus of the government, and while it has been introduced, there has been no official action on it since it was "referred to [a Congressional] Committee" in February 2013.<sup>175</sup> Although the government has not acted on it, the bill may still be enacted at any time, and the NCAA would be smart to be proactive. Clearly both the federal and state governments are concerned about social media monitoring of students and believe that in the digital age it is time to make some adjustments. The NCAA should not continue to fall behind while courts and legislators attempt to take action.

## V. THE ISSUE OF LEGAL LIABILITY FOR UNIVERSITIES

Through the use of monitoring systems, universities are actually leaving themselves vulnerable to lawsuits and increasing their likelihood of liability. One of the ways that schools expose themselves to liability is by failing to prevent a crime that they have been alerted to on social media. In 2010, University of Virginia student Yeardley Love was killed from a beating by the hands of her ex-boyfriend George Huguely.<sup>176</sup> At the time of the beating, Huguely was a member of the university's men's lacrosse team and Love of the women's team.<sup>177</sup> In 2012, Huguely was convicted of second-degree

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<sup>172</sup> *Id.* at § 3(A)(ii) .

<sup>173</sup> *See supra* Part III.C.

<sup>174</sup> *See* H.R. 537 § 3(A)(ii).

<sup>175</sup> *H.R. 537: Social Networking Online Protection Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr537> (last visited May 1, 2015).

<sup>176</sup> Sarah Netter & Emily Friedman, *University of Virginia Lacrosse Player Yeardley Love Severely Beaten, Court Docs Say*, ABC NEWS (May 4, 2010), <http://abcnews.go.com/GMA/TheLaw/yeardley-love-george-huguely-volatile-relationship-death/story?id=10547956>.

<sup>177</sup> *See* Mary Pat Flaherty, *George Huguely V Sentenced to 23 Years for Yeardley Love Murder*, WASH. POST (Aug. 30, 2012), [http://articles.washingtonpost.com/2012-08-30/local/35491592\\_1\\_university-of-virginia-lacrosse-lexie-love-yeardley-love](http://articles.washingtonpost.com/2012-08-30/local/35491592_1_university-of-virginia-lacrosse-lexie-love-yeardley-love).



murder for the act.<sup>178</sup> Bradley Shear, a social media attorney, proposes an interesting and seemingly realistic question that monitoring schools and the NCAA ought to consider: “What if the University of Virginia had been monitoring accounts in the Yeardeley Love case and missed signals that something was going to happen?”<sup>179</sup> He then asks, “[w]hat about the liability the school might have?”<sup>180</sup> This is just one example of a crime involving an NCAA athlete and it certainly seems like a real threat to NCAA schools. If the student-athlete were being monitored and showed any warning signs, such as threats or potential for violence, the family of the victim may file a lawsuit for the failure to prevent a crime.

Another strong example of the potential liability posed to universities through Internet monitoring and awareness is the Penn State scandal. During the investigations into former coach Jerry Sandusky’s child sex abuse, it was revealed that the school may have been aware of what Sandusky was doing.<sup>181</sup> If this turns out to be true, it could leave Penn State liable for “tens of millions of dollars” in damages.<sup>182</sup> In the aftermath of this news, one could fairly ask: “[W]hy would any university want to create more opportunities for lawsuits by monitoring and archiving the digital content of their student-athletes or employees?”<sup>183</sup> Regardless of the complicated ethical issues, an attorney’s concern is to limit his or her client’s legal liability. Similarly, if a school found out about a violation or crime taking place because of its social media monitoring, it would seem to follow that they have a duty to report this and a liability that would not have been there if not for the monitoring system. “Once you take on that kind of policing activity, it creates an obligation[.]”<sup>184</sup> As a result, the NCAA must come up with a new social media policy that does not leave its member institutions open to the potential for “tens or hundreds of millions of dollars in legal liability.”<sup>185</sup>

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<sup>178</sup> Mary Pat Flaherty et al., *George Huguely Guilty of Second-Degree Murder*, WASH. POST (Feb. 22, 2012), [http://www.washingtonpost.com/local/crime/george-huguely-guilty-of-second-degree-murder/2012/02/21/gIQA1ss4TR\\_story.html](http://www.washingtonpost.com/local/crime/george-huguely-guilty-of-second-degree-murder/2012/02/21/gIQA1ss4TR_story.html).

<sup>179</sup> Sullivan, *supra* note 67.

<sup>180</sup> *Id.*

<sup>181</sup> Susan Candiotti, *Disturbing E-Mails Could Spell More Trouble for Penn State Officials*, CNN (July 2, 2012), <http://www.cnn.com/2012/06/30/justice/penn-state-emails/>.

<sup>182</sup> Bradley Shear, *Penn State Sandusky Emails Prove NCAA Schools Should Not Social Media Monitor Their Student-Athletes*, SHEAR ON SOCIAL MEDIA LAW (June 30, 2012), <http://www.shearsocialmedia.com/2012/06/penn-state-sandusky-emails-prove.html>.

<sup>183</sup> *Id.*

<sup>184</sup> Dunning, *supra* note 25.

<sup>185</sup> Shear, *supra* note 182.

Another way that schools could be exposing themselves to major liability is by a potential “breach in security” that inadvertently leaks the personal information of the student-athletes to the public.<sup>186</sup> Further, a university could expose itself to liability for taking action against a student-athlete “for a post that he or she did not author or that was taken out of context.”<sup>187</sup> In that case, the student could have recourse for “reputational damage or lost future financial benefits linked to their athletic talents.”<sup>188</sup> Finally, schools are putting themselves at risk just by choosing to monitor their athletes or specific teams.<sup>189</sup> By monitoring only some of its students (either athletes, or even only certain teams), the school risks facing “accus[at]ions of discrimination.”<sup>190</sup> In sum, “[social media monitoring] opens up such a huge Pandora’s box,” and the NCAA may have created more of a problem than a solution with its decision to encourage schools to engage in this conduct.<sup>191</sup> “They’re essentially assuming a duty of care that they can’t enforce.”<sup>192</sup>

## CONCLUSION

Currently, universities that participate in NCAA sports receive encouragement from the NCAA “to monitor the social media accounts of [their] student-athletes.”<sup>193</sup> However, due to recent state statutes and court decisions that extend privacy protection to social media users, this practice appears to be illegal. The use of third-party monitoring services, or mandating that students “Facebook friend” a coach, forces students to give up their right to privacy and subjects them to an unconstitutional search. Both of these acts provide schools with a way to break through the privacy granted to social media users in the Stored Communications Act. In addition, the argument that students have consented to these searches seems likely to fail because under an analysis of case law, this consent appears to have been illegally obtained. Further, schools even expose themselves to liability of their own through monitoring, because it risks facing lawsuits for creating a duty,

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<sup>186</sup> Boxley, *supra* note 13.

<sup>187</sup> Dunning, *supra* note 25.

<sup>188</sup> *Id.*

<sup>189</sup> *See id.*

<sup>190</sup> *Id.*

<sup>191</sup> *See id.*

<sup>192</sup> *Id.*

<sup>193</sup> Dunning, *supra* note 25.

and then failing to prevent a crime of which it should have been aware. For example, if the monitoring leads to the discovery of a tweet that threatens imminent danger, the school itself could become vulnerable for failing to act. Overall, there are many problems with social media monitoring and it is time for the NCAA to act. The best solution would be for the NCAA to construct a social media policy outlawing any monitoring practices by its member schools, apply it uniformly to every team and every school, and enforce it as a “serious breach of conduct”<sup>194</sup> through its “infractions committee.” This policy would follow the path of both state legislatures and the United States judicial system in outlawing the practice of social media monitoring. In the end, the NCAA, its member institutions, and its student-athletes would all be best served by putting a stop to the practice of social media monitoring.

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<sup>194</sup> *New NCAA Enforcement Structure Takes Effect*, *supra* note 45.

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# How Far Is Too Far?

## THE PROPER FRAMEWORK FOR CIVIL REMEDIES AGAINST FACILITATORS OF TERRORISM

### INTRODUCTION

Perhaps no single issue in recent history has galvanized a greater governmental response than the fight against terrorism. Prior to 1992, that fight from a judicial standpoint was limited to criminal claims brought by the U.S. government against individuals and groups directly responsible for carrying out terrorist acts against Americans.<sup>1</sup> Since then, new events and new understandings of the nature of terrorism have triggered several expansions in the anti-terrorism statutes, most notably the addition of a civil remedy and the extension of criminal liability to include those who provide material support to terrorists.<sup>2</sup>

Since the introduction of these two provisions, courts have struggled to determine the elements of the civil cause of action under 18 U.S.C. § 2333 and how far such civil liability extends.<sup>3</sup> These issues have arisen primarily in cases in which terrorist victims have sued financial institutions or other organizations that allegedly provided money to the terrorists who caused their injuries.<sup>4</sup> While initially hesitant to extend civil liability beyond those directly involved in the attack,<sup>5</sup> courts have recently allowed claims against indirect financiers through a variety of theories and with little consistency in terms of the elements required for a successful claim.<sup>6</sup> In response, other courts and scholars have pushed back against this expansion, arguing that it violates general tort requirements and the intent

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<sup>1</sup> See 18 U.S.C. § 2332 (2012).

<sup>2</sup> See 18 U.S.C. §§ 2333, 2339A, 2339B, 2339C; see also *Gill v. Arab Bank PLC.*, 893 F. Supp. 2d 474, 493 (E.D.N.Y. 2012) (discussing history of statute).

<sup>3</sup> See *Gill*, 893 F. Supp. 2d at 483 (“Much of the relevant law is unsettled.”)

<sup>4</sup> See, e.g., *id.*; *Boim v. Quranic Literacy Inst. (Boim I)*, 291 F.3d 1000 (7th Cir. 2002).

<sup>5</sup> See, e.g., *Boim I*, 291 F.3d at 1011.

<sup>6</sup> See *Gill*, 893 F. Supp. 2d at 483 (describing different approaches courts have taken).

of Congress that the statute reach only those directly involved in the commission of a terrorist attack.<sup>7</sup>

This note will argue for a middle ground between the two extreme ends of this argument, expanding civil liability beyond those directly involved in the attack, but limiting it to only those facilitators whose material support proximately caused a plaintiff's injuries. Expanding liability beyond the principle actors is the best, and perhaps the only, way to effectively go after terrorist organizations. In virtually all cases, the primary actors are exceedingly difficult to find and have little if any attachable assets, meaning that limiting the civil remedy to these individuals would rarely, if ever, provide an actual remedy to a victim. On the other end, allowing suits against individuals and groups who fund terrorist activity will not only provide the victim with a chance to recover actual damages, it will go a long way toward disrupting the activities of terrorist groups.

Part I will examine the creation of the civil remedy, trace the remedy's expansion through a series of Seventh Circuit decisions, and then consider corresponding push-back and criticism to the expansion. Part II will look at approaches other courts have taken. Part III will argue that legislative history, the plain language of the statute, and policy considerations all support expanding liability beyond the principal actors. Part IV will first argue that the requirement of proximate cause will sufficiently limit the scope of liability and, second, will propose a framework by which to determine when material support has proximately caused plaintiff's injuries.

## I. CREATION OF REMEDY AND EXPANSION IN THE *BOIM* CASES

The provisions of § 2333 were initially enacted to provide victims of international terrorism a way to bring suit against the foreign individuals or groups who carried out the attack, who previously were beyond the jurisdictional reach of American courts. Eventually, courts expanded the statute to reach not only those who directly carried out the attack, but those who provided assistance to these groups.

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<sup>7</sup> See, e.g., Geoffrey Sant, *So Banks Are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 580-81 (2013).

### A. *Creation of Civil Remedy*

Congress adopted the current version of 18 U.S.C. § 2333 on October 29, 1992, as part of the Federal Courts Administrative Act of 1992.<sup>8</sup> Section 2333 reads in part:

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.<sup>9</sup>

The provision was largely a response to two terrorist attacks that occurred in the 1980s that highlighted gaps in the jurisdictional authority of U.S. courts. The first incident occurred in 1985, when terrorists hijacked a cruise ship travelling through the Mediterranean Sea and killed Leon Klinghoffer, an American citizen.<sup>10</sup> Klinghoffer's widow and other victims of the cruise ship hijacking brought suit against, among others, the Palestinian Liberation Organization (PLO), which was allegedly responsible for the attack.<sup>11</sup> Following a lengthy battle over jurisdiction, the court eventually allowed the claim against the PLO to proceed, because it determined that it fell within certain admiralty-related provisions of federal jurisdiction.<sup>12</sup> When Congress introduced Section 2333, it recognized that had the attack not occurred at sea, Ms. Klinghoffer would likely be without a remedy, noting that "a similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the U.S."<sup>13</sup> Further, as reflected in the testimony of Klinghoffer's daughter to Congress during hearings on Section 2333, following the initial favorable ruling on subject-matter jurisdiction, the

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<sup>8</sup> See Federal Courts Administration Act, Pub. L. No. 102-572, 106 Stat 4506 (Oct. 29, 1992). The statute actually has a somewhat complicated legislative history. It was first introduced as the Civil Remedies for Victims of Terrorism Act by Senator Charles Grassley in 1990, and incorporated into the Military Construction Appropriations Act of 1991. See Military Construction Appropriations Act, Pub. L. No. 101-519, 104 Stat 2240 (Nov. 5, 1991). The bill was repealed in 1991, then reintroduced and re-adopted in 1992. See *id.*

<sup>9</sup> 18 U.S.C. § 2333 (2012).

<sup>10</sup> See H.R. REP. No. 102-1040, at 5 (1992) ("The recent case of the Klinghoffer family is an example of this gap in our efforts to develop a comprehensive legal response to international terrorism.").

<sup>11</sup> See *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated on other grounds*, 937 F.2d 44 (2d Cir. 1991).

<sup>12</sup> See *id.*, at 858-59.

<sup>13</sup> H.R. REP. 102-1040, at 5.

family became embroiled in a long and costly fight to secure personal jurisdiction over the PLO, eventually settling more than a decade after the original incident.<sup>14</sup>

The second attack that spurred the creation of the civil remedy occurred in 1988, when two Libyan terrorists smuggled a bomb onto a Pan Am flight that exploded over Scotland, killing 270 people.<sup>15</sup> The victims' families were eventually able to secure a judgment against Pan Am for willful misconduct in allowing the bomb onto the plane.<sup>16</sup> Still, the families faced numerous hurdles in trying to bring a suit against the terrorists responsible for the attack. Notably, even after the two smugglers were identified and indicted by a federal grand jury, Libya refused to turn the men over to U.S. authorities to stand trial.<sup>17</sup>

Together, these two incidents provided the impetus for reform. Congress eventually passed Section 2333's civil remedy to ensure that terrorist attack victims and their families could file suit in U.S. courts and have a remedy available to them for injuries stemming from those acts of terrorism.<sup>18</sup>

## B. Boim I

It was not until 2002, ten years after Section 2333 first became law, that it was first addressed by the courts in a series of cases in the Seventh Circuit arising from the killing of David Boim, a dual American and Israeli citizen, by members of Hamas in Israel in 1996.<sup>19</sup> Boim's parents brought suit under Section 2333 against Hamas and the two identified Hamas members who carried out the attack.<sup>20</sup> They also named as defendants two American nonprofit organizations, Quiranic Literary Institute (QLI) and Holy Land Foundation (HLF). QLI was an Illinois organization engaged in translating sacred Islamic texts.<sup>21</sup> HLF was a Texas group that raised money for

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<sup>14</sup> *Anti-Terrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. On Courts & Admin. Practice of the S. Comm. on the Judiciary*, 101st Cong. 56-57 (1991) [hereinafter *Anti-Terrorism Hearing*] (statement of Lisa Klinghoffer).

<sup>15</sup> David Treadwell, *Pan Am Guilty of 'Willful Misconduct': Verdict: Jury Finds Airline, now Defunct, to be Negligent in the Lockerbie Bombing that Claimed 270 Lives. Victims' Families can now Seek Further Damages*, L.A. TIMES (July 11, 1992), [http://articles.latimes.com/1992-07-11/news/mn-1480\\_1-willful-misconduct](http://articles.latimes.com/1992-07-11/news/mn-1480_1-willful-misconduct).

<sup>16</sup> *Id.*

<sup>17</sup> Treadwell, *supra* note 15.

<sup>18</sup> See *infra* Part III.A.

<sup>19</sup> *Boim v. Quranic Literary Inst. (Boim I)*, 291 F.3d 1000, 1002, 1009 (7th Cir. 2002) ("No court has yet considered the meaning or scope of section[] . . . 2333, and so we write upon a tabula rasa.").

<sup>20</sup> *Id.* at 1004.

<sup>21</sup> *Id.* at 1003.

humanitarian relief efforts.<sup>22</sup> According to the Boims, the groups were also fronts for Hamas, raising and funneling money for the terrorist group in support of its terrorist activities.<sup>23</sup> In *Boim I*, QLI and HLF moved to dismiss the case for failure to state a claim, arguing that Section 2333 did not provide a cause of action beyond those directly involved in the attack.<sup>24</sup> In response, the Boims put forth three theories for establishing their claim against QLI and HLF: (1) Donating money to Hamas satisfies § 2331's definition of international terrorism; (2) Section 2333 incorporates into the civil remedy the criminal material support provisions of §§ 2339A, 2339B and 2339C, which criminalizes the provision of material support, including monetary support, to terrorist groups; and (3) Section 2333 provides for civil aiding and abetting liability.<sup>25</sup> The district court denied the motion to dismiss, rejecting Boim's first theory but accepting their second and third theories.<sup>26</sup>

The Seventh Circuit agreed with the district court on the first theory, that solely providing money to Hamas, without more, did not constitute "international terrorism" under § 2333.<sup>27</sup> Section 2333 defines international terrorism, by reference to § 2331, as activities that "involve violent acts or acts dangerous to human life," appear intended to intimidate or coerce, and occur primarily outside of the United States.<sup>28</sup> The Seventh Circuit in *Boim I* decided that merely providing money to a terrorist group did not constitute a violent act or act dangerous to human life, concluding that to label such activity as terrorism would give § 2333 "an almost unlimited reach."<sup>29</sup>

The Seventh Circuit also accepted Boim's second theory, that § 2333 incorporated §§ 2339A and 2339B, which criminalize the provision of material support to terrorist groups and terrorist activity.<sup>30</sup> Section 2339A makes it a crime to provide material support, including furnishing money or financial services, with the intention that the support be used to facilitate terrorist activity.<sup>31</sup> Section 2339B criminalizes the provision of support to known terrorist groups, regardless of

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1004.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1005.

<sup>26</sup> *Id.* at 1005-06.

<sup>27</sup> *Id.*

<sup>28</sup> 18 U.S.C. § 2331(1)(A) (2012).

<sup>29</sup> *Boim I*, 291 F.3d at 1009.

<sup>30</sup> *Id.* at 1012, 1015; 18 U.S.C. §§ 2339A, 2339B.

<sup>31</sup> 18 U.S.C. § 2339A.



whether the donor intends that the support be used to facilitate terrorist activity.<sup>32</sup> The Seventh Circuit concluded that because Congress chose to impose criminal liability for such behavior, they must have intended to impose civil liability as well.<sup>33</sup>

Finally, the Seventh Circuit agreed with the district court that § 2333 provided for civil aiding and abetting liability. In opposing this theory, QLI and HLF noted that the Supreme Court in *Central Bank of Denver N.A. v. First Interstate Bank of Denver* held that civil aiding and abetting liability is only available where the specific statute expressly provided for it.<sup>34</sup> The Seventh Circuit held that *Central Bank* did not apply to § 2333 for four reasons. First, *Central Bank* involved an implied civil cause of action (the SEC's provision against securities fraud does not contain an express civil cause of action, but one has been implied by the courts), while § 2333 involved an express civil cause of action.<sup>35</sup> Second, based on the legislative history, the court concluded that Congress intended § 2333 to include general tort principles, including aiding and abetting liability.<sup>36</sup> Third, the court concluded, based on the legislative history and the language of the statute, that Congress intended that civil liability in § 2333 to be at least as extensive as the criminal liability provided for under §§ 2339A and 2339B.<sup>37</sup> Specifically, the court pointed to the phrase "involve . . . acts dangerous to human life" in the definition of international terrorism in concluding that such broad language necessarily showed Congress's intent to impute all avenues of traditional criminal and civil liability into the anti-terrorism provisions.<sup>38</sup> Aiding and abetting, the court concluded, was both well-ingrained in traditional notions of tort law and, in the context of facilitating terrorist activity, was clearly an activity that "involve[d] acts dangerous to human life."<sup>39</sup> Finally, again pointing to language from the legislative history, the court concluded that in passing § 2333, Congress intended to go after the funding of terrorist group and that disallowing aiding and

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<sup>32</sup> 18 U.S.C. § 2339B; *see also* Gill v. Arab Bank PLC., 893 F. Supp. 2d 474, 504 (E.D.N.Y. 2012).

<sup>33</sup> *Boim I*, 291 F.3d at 1019.

<sup>34</sup> *See id.* at 1005; *see also* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 165 (1994) (holding that Section 10(b) of the Securities Exchange Act of 1934 does not provide a private right of action for aiding and abetting).

<sup>35</sup> *Boim I*, 291 F.3d at 1019.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1015.

<sup>39</sup> *Id.* at 1020.

abetting liability would thwart that effort.<sup>40</sup> The court then went on to explain the elements of an aiding and abetting cause of action, pointing to *Halberstam v. Welch*, in which the Supreme Court set out the elements of civil aiding and abetting liability.<sup>41</sup> Under this framework, one is liable where they provide “substantial assistance” to another in accomplishing a tortious act.<sup>42</sup>

Thus, in the first instance of a court encountering the § 2333 civil cause of action, the *Boim I* court allowed a Hamas victim’s survivors to bring a civil claim against two alleged Hamas donors on two separate theories: (1) primary liability, by concluding that the civil claim incorporated the material support activities included in the criminal provisions; and (2) secondary liability, by concluding that the civil claim includes aiding and abetting liability.

### C. Boim II, Boim III, and Criticism

Following the ruling in *Boim I*, affirming the denial of the defendant’s motion to dismiss, the case returned to the district court. In 2004, the district court granted summary judgment to the plaintiff against all defendants except QLI.<sup>43</sup> The court concluded that plaintiffs satisfied the elements for aiding and abetting liability against HLF: (1) David Boim was killed by an attack carried out by Hamas, and (2) HLF provided material support to Hamas knowing that Hamas was engaged in terrorist activities.<sup>44</sup> The Seventh Circuit reversed and remanded in 2007 (*Boim II*).<sup>45</sup> In *Boim II*, the Seventh Circuit reiterated its holding that aiding and abetting was available under § 2333.<sup>46</sup> However, it concluded that even in such secondary liability cases, there must be a showing of causation, requiring the plaintiff’s injuries to be a foreseeable consequence of the defendant’s contributions to Hamas.<sup>47</sup> In this case, the court concluded it was not sufficiently foreseeable

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<sup>40</sup> *Id.* at 1019.

<sup>41</sup> *See id.* at 1012 (citing *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

<sup>42</sup> *Id.*

<sup>43</sup> *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 931 (N.D. Ill. 2004).

<sup>44</sup> *Id.* The second element was satisfied by collateral estoppel, as the D.C. Circuit had previously affirmed a criminal conviction against HLF for materially supporting Hamas. *Id.*

<sup>45</sup> *Boim v. Holy Land Found. for Relief & Dev. (Boim II)*, 511 F.3d 707 (7th Cir. 2007) (order vacating judgment); *see also* *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 688 (7th Cir. 2008) (discussing findings of the *Boim II* court).

<sup>46</sup> *See Boim III*, 549 F.3d at 688.

<sup>47</sup> *Id.* at 692.

that HLF's procurement of funds and other support to Hamas would result in plaintiff's injuries.<sup>48</sup>

Plaintiffs petitioned for and received rehearing by the Seventh Circuit en banc (*Boim III*).<sup>49</sup> In *Boim III*, the Seventh Circuit reversed course in several key respects, eliminating aiding and abetting liability, but arguably expanding the reach of § 2333. First, the court reversed its *Boim I* holding as to aiding and abetting liability, concluding that *Central Bank* controlled, and thus Congress's silence meant there was no aiding and abetting liability.<sup>50</sup> Further, the court reasoned that to allow aiding and abetting liability would expand "the federal courts' extraterritorial jurisdiction," a power that is reserved to Congress.<sup>51</sup> After rejecting aiding and abetting liability, the court turned to the elements required for a primary liability through incorporation claim. While the court concluded that causation is required, it rejected the *Boim II* holding that causation—both cause in fact and proximate cause—was lacking as to HLF.<sup>52</sup>

On the issue of cause in fact, the court equated the case with the multiple fires example from torts. The multiple fires example involves two fires simultaneously converging to burn down a building.<sup>53</sup> Because the fires converged, it is impossible to determine which fire caused the building to burn down. In such cases, the analysis shifts from whether each individual event caused the result to whether each event was a substantial factor in bringing about the result.<sup>54</sup> The court reasoned that although it was impossible to determine whether an individual monetary donation to a terrorist group caused the attack, the requirement of but-for causation would be relaxed to avoid a situation in which an injured party was without a remedy.<sup>55</sup>

On the issue of proximate cause, the court rejected the *Boim II* conclusion that the plaintiff's injury was not a foreseeable result of HLF's support.<sup>56</sup> "Giving money to Hamas," knowing the nature of its activities, the court reasoned, was

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<sup>48</sup> *Id.* at 698-700.

<sup>49</sup> *Id.* at 688.

<sup>50</sup> *Id.* at 689.

<sup>51</sup> *Id.* at 689-90.

<sup>52</sup> *Id.* at 690-92.

<sup>53</sup> *Id.* at 695-97.

<sup>54</sup> *Id.* at 697.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 698.

analogous to “giving a loaded gun to a child.”<sup>57</sup> That is, just as it would be reasonably foreseeable that giving a gun to a child would result in the child or someone else being shot, it is reasonably foreseeable that giving money to Hamas would lead to a terrorist act resulting in injury. The court remanded the case as to HLF to determine whether there was causation in this case, as the lower court had not even addressed the subject in its original summary judgment decision.<sup>58</sup>

The dissent in *Boim III* criticized the holding in several respects. First, it argued that the majority’s new conception of causation in these cases—essentially that any financial contribution to a terrorist group was a cause of a subsequent attack by that group—effectively eliminated a causation requirement.<sup>59</sup> Second, the court noted that by treating the case as one of primary rather than secondary liability, it eliminated the need to show that the defendants intended that their support would be used to facilitate terrorist activity.<sup>60</sup> As in this case, recklessness would now be sufficient; a donor who knew or should have known the nature of the organization could be held liable. Taken together, the dissent concluded, “[t]his sweeping rule of liability leaves no role for the factfinder to distinguish between those individuals and organizations who directly and purposely finance terrorism from those who are many steps removed from terrorist activity and whose aid has, at most, an indirect, uncertain, and unintended effect on terrorist activity.”<sup>61</sup> In the case of HLF, the dissent concluded, there was a genuine issue whether it knew or intended that its donations to various alleged Hamas front charities would in fact be used to facilitate Hamas’s terrorist activity.<sup>62</sup> The dissent envisioned liability for a potentially endless array of groups and individuals, including groups who host Hamas speakers at their conventions or publish sympathetic editorials.<sup>63</sup> At some point, the dissent argued, “the harm is simply too remote from the original tortious act to justify holding the actor responsible for it.”<sup>64</sup> Finally, and relatedly, the dissent argues that the majority’s holding would expose a donor to potentially endless liability, as one who gives

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<sup>57</sup> *Id.* at 690.

<sup>58</sup> *Id.* at 701.

<sup>59</sup> *Id.* at 705 (Rovner, J., concurring in part and dissenting in part).

<sup>60</sup> *Id.* at 707.

<sup>61</sup> *Id.* at 705.

<sup>62</sup> *Id.* at 706.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 724.

money to Hamas in 2000 could theoretically be held perpetually liable for any subsequent Hamas attacks.<sup>65</sup>

#### D. *Sant's Criticism*

Geoffrey Sant, a professor at Fordham Law School, advances two primary criticisms of *Boim III* and other court decisions that allowed claims to proceed against banks under § 2333, namely that (1) providing financial support does not fall within the meaning of “international terrorism,” as defined by § 2331; and (2) that the legislative history supports a more narrow reading of § 2333.

First, Sant argues that the term “international terrorism” in § 2333 and its definition in § 2331 as an activity that “involves acts dangerous to human life” does not include the furnishing of money or financial services.<sup>66</sup> He points to *Stutts v. De Dietrich Group*, one of the earliest known § 2333 decision involving a bank.<sup>67</sup> In *Stutts*, a group of former military members exposed to toxic gas while deployed in Iraq brought suit against De Dietrich Group, a bank that issued letters of credit to alleged producers and suppliers of the sarin gas used against the injured plaintiffs.<sup>68</sup> The court referenced the decision in *Boim I*—which held that funding by itself did not constitute international terrorism—in concluding that merely issuing letters of credit similarly did not constitute “an act dangerous to human life” as required by the international terrorism definition.<sup>69</sup> Sant reasons that it is hard to envision corporate bankers acting in their normal business duties as fitting into the conception of international terrorists.<sup>70</sup>

Sant's second argument is that Congress intended § 2333 to be a jurisdictional and largely symbolic provision with limited reach, specifically targeting the terrorist actors themselves and providing actual relief in only the very small number of cases where these terrorist groups have attachable assets in the United States.<sup>71</sup> Sant first points to several examples from the legislative history that he says demonstrates that Congress adopted the civil remedy as a

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<sup>65</sup> *Id.*

<sup>66</sup> See Sant, *supra* note 7, at 579.

<sup>67</sup> *Id.* at 579; *Stutts v. De Dietrich Grp.*, No. 03-CV-4058, 2006 WL 1867060, at \*1 (E.D.N.Y. June 30, 2006).

<sup>68</sup> *Stutts*, 2006 WL 1867060, at \*1.

<sup>69</sup> *Id.* at \*2-\*3.

<sup>70</sup> Sant, *supra* note 7, at 539.

<sup>71</sup> *Id.* at 549.

purely jurisdictional provision. Sant focuses on the *Klinghoffer* and *Pan Am* cases, which were the impetus behind the adoption of § 2333.<sup>72</sup> First, he notes that the main issue in the *Klinghoffer* case, was the court's inability, but for certain admiralty provisions, to secure personal jurisdiction over a terrorist group with no contacts with the United States.<sup>73</sup> The civil remedy, Sant argues, was created as a way to close this jurisdictional loophole, which would allow terrorist victims to sue their attacker if the attack occurred at sea but not on land or in an airplane.<sup>74</sup> Sant focuses on testimony given by Joseph Morris, the president of the Lincoln Legal Foundation, during a subcommittee hearing on the civil remedy, where he emphasized that § 2333's purpose was to redress jurisdictional issues.<sup>75</sup> Morris testified that

Victims who have attempted to sue terrorists have encountered numerous jurisdictional hurdles and have found the courts reluctant to intrude in the absence of clear statutory mandates showing them what their jurisdictional boundaries are<sup>76</sup> . . . . Whereas that [*Klinghoffer*] opinion rested on the special nature of our admiralty laws, this bill will provide general jurisdiction to our federal courts and a cause of action for cases where an American has been injured by an act of terrorism overseas.<sup>77</sup>

Sant also cites to testimony by Lisa Klinghoffer, the victim's daughter, who testified that "it's taken our family [four and a half] years to give us the right to sue the PLO. We are hoping that other families in the future won't have to go through the years that we have gone through. They will have that . . . right."<sup>78</sup>

Sant then points to examples from the legislative history that he contends shows Congress's intent to limit the § 2333 civil remedy to the terrorist actors directly involved in carrying out the attacks. For example, he points to testimony by the chairmen of a group representing the victims of the Pan Am attack, who did not mention third-party actors, instead stating that the civil remedy "would permit victims of terrorism to file civil actions against *terrorists and terrorist*

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<sup>72</sup> See *id.*; see also *supra* Part I.A.

<sup>73</sup> Sant, *supra* note 7, at 541.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 541-42.

<sup>76</sup> *Anti-Terrorism Hearing*, *supra* note 14, at 78 (statement of Joseph Morris, President, Lincoln Legal Foundation).

<sup>77</sup> *Id.* at 17.

<sup>78</sup> *Id.* at 75 (statement of Lisa Klinghoffer).

organizations.”<sup>79</sup> Sant also points out that the victims of the *Klinghoffer* and *Pan Am* cases, the cases that triggered § 2333, were able to secure monetary relief against third parties such as the airline and cruise operator, and that the families sought the civil remedy as a way to sue the actual perpetrators and either get money (if the terrorist group could be found and had assets in the United States), or, more likely, some sort of moral vindication or sense of justice.<sup>80</sup> As Sant notes, Lisa Klinghoffer seems to suggest as much in her testimony before Congress: “If one such as Abu Abbas [the mastermind of the attack that killed her father] or his agents can be found within our borders, he could be made to answer for his deeds.”<sup>81</sup> Sant further points to statements by Senator Grassley, the sponsor of the bill, that “[T]his bill provides victims with the tools necessary to *find terrorists’ assets and seize them*,” which suggests he was focused on instances where a terrorist group itself may have assets in the United States.<sup>82</sup>

Sant argues there are several factors that have led judges to assume an activist role in these cases, ignoring Congressional intent and contorting the definition of international terrorism in order to include the activities of banking defendants. These include the horrendous nature of terrorist acts, the desire to punish terrorist groups, the overwhelmingly sympathetic nature of the victims, and the desire to provide victims with a financial remedy.<sup>83</sup> These sentiments are reflected in the decision of courts. Sant notes, for instance, that the *Boim II* opinion contains references to David Boim’s “trademark hug and smile.” He further contends that in most murder cases, judges do not make these kind of sympathy-inducing references to victims, but rather only refer to victims to explain the circumstances of the death or in reference to other more factual information. Sant perceives this as evidence of judges’ particular susceptibility to sympathy in these cases.<sup>84</sup>

Sant also focuses at length on a particular sentence in the *Boim III* opinion. After concluding that § 2333 does not provide for aiding and abetting liability, the court goes on to say that “an alternative and more promising ground for bringing donors . . . within the grasp of section 2333” would be

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<sup>79</sup> Sant, *supra* note 7, at 544 (emphasis in original).

<sup>80</sup> *Id.* at 546.

<sup>81</sup> *Anti-Terrorism Hearing*, *supra* note 14, at 59, 62.

<sup>82</sup> Sant, *supra* note 7, at 545 (emphasis in original).

<sup>83</sup> *See id.* at 535.

<sup>84</sup> *See id.* at 536, 557.

the primary liability through incorporation theory.<sup>85</sup> Sant calls this “a remarkable and seemingly revealing passage,” suggesting that the “more promising” language shows that “the court may have been searching for a means of reaching a predetermined result.”<sup>86</sup> As Sant notes, the dissent in *Boim III* also quotes this language.<sup>87</sup> The dissent begins its opinion by noting that, “[t]he murder of David Boim was an unspeakably brutal and senseless act, and I can only imagine the pain it has caused his parents.” The dissent goes on to describe terrorism as a “scourge” before qualifying that, “it is [the court’s] responsibility to ask whether [terrorism] presents so unique a threat as to justify the abandonment of” the causation requirement and to justify the other deficiencies in the majority opinion.<sup>88</sup>

## II. APPROACHES FOLLOWING THE *BOIM* DECISIONS

Bolstered by the ruling in *Boim I*, § 2333 became the basis for a number of new lawsuits, primarily aimed at financial institutions with alleged ties to terrorist groups. While some courts adopted, and even expanded, the *Boim I* approach, other courts pushed back.

### A. Courts Embracing the *Boim I* Approach

In 2004, two years after *Boim I*, the families of several Americans killed in a purported Hamas terrorist attack in Israel in 2000 brought suit in New York against Arab Bank P.L.C.<sup>89</sup> Arab Bank is one of the largest financial institutions in the Middle East.<sup>90</sup> It is headquartered in Jordan and does business all over the world.<sup>91</sup> According to the plaintiffs in *Linde v. Arab Bank P.L.C.*, Arab Bank maintained accounts for several groups and individuals it knew were fronts for Hamas, and that Hamas utilized these accounts to fund its terrorist activities.<sup>92</sup> The plaintiffs further alleged that Arab Bank was the administrator of a “universal death and dismemberment

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<sup>85</sup> *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 690 (7th Cir. 2008).

<sup>86</sup> Sant, *supra* note 7.

<sup>87</sup> *Id.*

<sup>88</sup> *Boim III*, 549 F.3d at 705 (Rovner, J., concurring in part and dissenting in part).

<sup>89</sup> *Linde v. Arab Bank*, 384 F. Supp. 2d 571, 575-76 (E.D.N.Y. 2005).

<sup>90</sup> Arab Bank, *Our Profile* (2013), <http://www.arabbank.com/en/profile.aspx?CSRT=2366691262021416800>.

<sup>91</sup> *Id.*

<sup>92</sup> *Linde*, 384 F. Supp. 2d at 578.



plan,” through which families of Hamas agents killed or injured received a cash payment.<sup>93</sup> According to the plaintiffs, Hamas provided the bank with a list of eligible individuals, who then provided the bank with the necessary certificates and received payment.<sup>94</sup> The plaintiffs alleged that the maintenance of accounts and the handling of the payment plan facilitated and encouraged Hamas’s terrorist activity, and they sought to hold them secondarily liable for the victims’ injuries, relying on *Boim I*.<sup>95</sup> The district court, in denying Arab Bank’s motion to dismiss, relied on the language and reasoning of *Boim I*, concluding that § 2333 allows for aiding and abetting liability.<sup>96</sup> The court further held that § 2333 allows for civil conspiracy liability, which was never addressed in *Boim I*. The court reasoned that the criminal portions of the act included conspiracy liability, and that there was no reason not to extend this to the civil remedy as well.<sup>97</sup> The court went on to conclude that plaintiffs’ allegations established a claim under either an aiding and abetting theory or a conspiracy theory, and that, were they to prove at trial that the victims were killed by terrorists who were enrolled in the benefit plan, such proof would be sufficient to prevail on either theory.<sup>98</sup>

Other courts similarly embraced the *Boim I* secondary liability holding. In *Wutz v. Islamic Republic of Iran*, a victim of an attack by a Palestinian terrorist group sued the Bank of China in the D.C. District Court, alleging that the Bank made several wire transfers to the Palestinian group through its leadership in Iran.<sup>99</sup> Relying on the aiding and abetting liability theory for the reasons set forth in *Boim I*, the court held that the plaintiffs pled sufficient facts to state an aiding and abetting claim against Bank of China. The court pointed to the allegations that the Palestinian terrorist group carried out the attacks that injured plaintiff, and that the Bank knowingly provided them with material assistance.<sup>100</sup>

Similarly, in 2010, the District Court for the Southern District of Florida recognized both the aiding and abetting theory and conspiracy liability theory under § 2333. *In Re Chiquita Brands Intern, Inc., Alien Tort Statute and*

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<sup>93</sup> *Id.* at 577.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 577, 582-83.

<sup>96</sup> *Id.* at 583.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 585.

<sup>99</sup> *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 18 (D.D.C. 2010).

<sup>100</sup> *Id.* at 54-57.

*Shareholder Derivative Litigation* involved five missionaries who were kidnapped in 1993 and 1994 and eventually killed by a Colombian terrorist group, Fuerzas Armadas Revolucionarias de Colombia (FARC).<sup>101</sup> Chiquita, an Ohio-based company engaged in the production and distribution of bananas, made numerous secret payments and smuggled weapons to FARC from 1989 through 1997.<sup>102</sup> Chiquita pled guilty in 2007 to numerous violations of the criminal terrorism provisions.<sup>103</sup> Following this guilty plea, families of the five victims brought suit against Chiquita under both primary and secondary liability theories.<sup>104</sup> The court concluded that the plaintiffs pled sufficient facts to establish a claim under the *Halberstam* test for aiding and abetting liability,<sup>105</sup> holding that Chiquita's alleged monetary donations and weapons smuggling qualified as "substantial assistance."<sup>106</sup> Further, the court recognized civil conspiracy liability under § 2333, and held that the plaintiffs' allegations stated a conspiracy claim as there were sufficient allegations as to a common scheme between the two organizations.<sup>107</sup>

#### B. *Pushing Back against Secondary Liability*

In 2012, another Hamas victim brought a claim against Arab Bank in the Eastern District of New York.<sup>108</sup> Mati Gill, a dual American-Israeli citizen, was injured by a bullet fired from the Gaza Strip, in an incident for which Hamas took credit.<sup>109</sup> He brought suit against Arab Bank, asserting claims under a variety of statutes, including primary and secondary liability under § 2333.<sup>110</sup> The court first concluded that § 2333 does not allow for civil aiding and abetting liability, relying on the rule set out by the Supreme Court in *Central Bank*.<sup>111</sup> The court rejected the *Boim I* reasoning that § 2333 was distinguishable from the statute in *Central Bank* because it involved an express cause of action and because Congress intended to expand liability beyond primary actors in the terrorism context.<sup>112</sup> The

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<sup>101</sup> *In re Chiquita Brands Int'l*, 690 F. Supp. 2d 1296, 1301-02 (S.D. Fla. 2010).

<sup>102</sup> *Id.* at 1302-03.

<sup>103</sup> *Id.* at 1303.

<sup>104</sup> *Id.* at 1309.

<sup>105</sup> *Id.* at 1310; *see also supra* Part I.B.

<sup>106</sup> *Chiquita*, 690 F. Supp. 2d at 1310-11.

<sup>107</sup> *Id.* at 1311.

<sup>108</sup> *Gill v. Arab Bank PLC.*, 893 F. Supp. 2d 474, 479 (E.D.N.Y. 2012).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 479-80.

<sup>111</sup> *Id.* at 481.

<sup>112</sup> *Id.* at 499-500.

court concluded that *Central Bank* was not intended to be limited to implied rights of action, and that the issue of whether Congress intended to extend liability to secondary actors is irrelevant in light of the *Central Bank* rule, since Congress did not explicitly make such a distinction in the statute.<sup>113</sup> However, the court recognized the primary liability through incorporation theory described in *Boim I*.<sup>114</sup> Additionally, the court set out the specific elements a plaintiff would need to prove to succeed on such a claim. According to the court, the primary liability through an incorporation claim had three elements: wrongful act, mental state, and causation.<sup>115</sup> That is, first, the plaintiff must show that the defendant violated the acts and satisfied the mental state described in the specific material support criminal provision.<sup>116</sup> Second, the plaintiff must show that the defendant's actions proximately caused his or her injuries.<sup>117</sup>

The Second Circuit eventually weighed in, agreeing with the Eastern District that § 2333 did not allow aiding and abetting liability but did allow for primary liability for material supporters through incorporation. In *Rothstein v. UBS AG*, the plaintiffs, injured in a series of rocket attacks in Israel, allegedly carried out by Hamas and Hezbollah, sued UBS, a Swiss bank with offices throughout the U.S.<sup>118</sup> According to plaintiffs, UBS provided financial services and other forms of support to Iran, which in turn provided various forms of material support, including large amounts of money, to Hamas and Hezbollah.<sup>119</sup> Through this alleged chain of support, the plaintiffs sought to hold UBS primarily and secondarily liable under § 2333 for their injuries.<sup>120</sup> In affirming the district court's decision to grant defendant's motion to dismiss, the Second Circuit first held that § 2333 does not allow for aiding and abetting liability in light of the *Central Bank* holding.<sup>121</sup> The court then went on to recognize the primary liability through incorporation theory but affirmed the dismissal nonetheless because the plaintiffs had failed to plead sufficient facts, specifically as to the

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 502.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Rothstein v. UBS AG*, 708 F.3d 82, 84-85, 87 (2d Cir. 2013).

<sup>119</sup> *Id.* at 84-85.

<sup>120</sup> *Id.* at 88.

<sup>121</sup> *Id.* at 97.

connection between Iran and the terrorist groups, to plausibly show that UBS proximately caused their injuries.<sup>122</sup>

As demonstrated above, courts and scholars have taken § 2333 to two extremes. On the one end is Geoffrey Sant, who contends that civil actions should be limited to those directly involved in carrying out the terrorist attack that caused a particular plaintiff's injuries. On the other end is *Boim III*, which would conceivably attach civil liability to anyone who knowingly or even recklessly provided money, services, encouragement, or other support to the terrorist group responsible for the plaintiff's injuries. The proper approach to these contending positions lies somewhere in between.

### III. LEGISLATIVE HISTORY, PLAIN LANGUAGE, AND POLICY SUPPORT EXTENDING LIABILITY BEYOND THOSE DIRECTLY INVOLVED IN THE ATTACK

#### A. *Legislative History*

The legislative history of § 2333 indicates that Congress intended the provision to be read broadly. The language of the statute was left intentionally broad, and it was passed as part of Congress's effort to expand the scope of its fight against terrorism and provide victims with a remedy.

A 1992 report from the House Judiciary Committee regarding the adoption of § 2333 notes that, "The recent case of the Klinghoffer family is an example of this gap in our efforts to develop a *comprehensive* legal response to international terrorism."<sup>123</sup> The *Klinghoffer* case involved a family left without a legal remedy and a group of individuals that were not held accountable for their actions due to jurisdictional limitations. In emphasizing its desire for § 2333 to be a *comprehensive* response to this gap, Congress indicates its intent for § 2333 to be read as broadly as possible as a way to eliminate the previous inequities.

The Senate Judiciary Committee Report also highlights the expansive nature of the legislation. It notes that,

[Section 2333] would allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed. By

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<sup>122</sup> *Id.*

<sup>123</sup> H.R. REP. 102-1040, at 5 (1992) (emphasis added).

its provisions for compensatory damages, tremble [sic] damages, and the imposition of liability at any point along the causal chain of terrorism, it would interrupt, or at least imperil, the flow of money.<sup>124</sup>

This passage reflects the evolving understanding in the fight against terrorism. Terrorist groups, unlike other bad actors, are virtually impossible to attack directly through the courts. Instead, these groups can be significantly deterred by securing judgments against the entities that provide them money and supplies. In recognizing that § 2333 was a key part of this new fight against terrorism, Congress clearly intended the statute would extend to these financial supporters of terrorism.

Further Congressional testimony provides additional insight into the broad and comprehensive intent of the legislators. In introducing the bill in 1991, Senator Charles Grassley noted that,

[The Anti-Terrorism Act (ATA) civil remedy] empowers victims with all the weapons available in civil litigation, including: Subpoenas for financial records, banking information, and shipping receipts—this bill provides victims with the tools necessary to find terrorists' assets and seize them. The ATA accords victims of terrorism the remedies of American tort law, including treble damages and attorney's fees.<sup>125</sup>

Later, he stated that, “[o]ur resolve to fight terrorism and equip victims with civil remedies for terrorist acts is as strong as ever.”<sup>126</sup> Moreover, in a subsequent hearing on the bill in 1992, Senator Grassley stated, “While this bill will not permit civil actions against sovereign leaders, *it will allow the victims to pursue renegade terrorist organization and their leaders, and go after the resource that keeps them in business—their money.*”<sup>127</sup>

Moreover, at a hearing on an earlier version of the ATA civil remedy, Joseph Morris, a former Department of Justice attorney testified that,

I think that the bill as drafted is powerfully broad, and its intention, as I read it, is to bring focus on the problem of terrorism and, reaching behind the terrorist actors to those who fund and guide and harbor them, bring all of the substantive law of the American tort law system.<sup>128</sup>

Finally, the specific order in which the material support provisions were adopted shows Congress's evolving and

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<sup>124</sup> S. REP. NO.102-342, at 22 (1992).

<sup>125</sup> 137 CONG. REC. S4511-04, 1991 WL 56141, at \*1 (daily ed. Apr. 16, 1991).

<sup>126</sup> *Id.* at 2.

<sup>127</sup> *Gill v. Arab Bank PLC.*, 893 F. Supp. 2d 474, 496 (E.D.N.Y. 2012).

<sup>128</sup> *Anti-Terrorism Hearing*, *supra* note 14, at 136 (statement of Joseph A. Morris).

expanding sense of how to pursue terrorist groups. In 1994, 18 U.S.C. § 2339A was passed, which criminalizes providing money or other support to a terrorist group with the intention that the support be used to further the terrorist activity.<sup>129</sup> Section 2339B followed in 1996 as a way to close the loophole created by 2339A; it targeted individuals who give money to terrorist groups under the guise of a charitable donation.<sup>130</sup> This section criminalized material support to terrorist groups regardless of whether the person intended that the support would be used to facilitate terrorist activity.<sup>131</sup> Finally, 18 U.S.C. § 2339C, passed in 2006, extends liability beyond donating money to the mere furnishing of financial services.<sup>132</sup> Together, these statutes show an evolving understanding of how best to target and dismantle terrorist groups and a continually expanding commitment to pursue terrorist groups at all possible levels. The civil remedy should be read in the context of Congress's ever-evolving and ever-expanding position regarding terrorist organizations.

Sant argues that the legislative history shows that Congress intended the civil remedy to be a largely symbolic provision that would only come into play on the rare occasion when a terrorist group had attachable assets in the United States.<sup>133</sup> However, as noted above, the statute is broad by design and should be read in the context of current understanding. The individuals Sant quotes may not have thought it practicable or possible to identify the source of money behind terrorist groups and may have believed that a symbolic defeat of a terrorist group would have a significant impact. As recent years have shown, and as Congress's subsequent actions have revealed, the current understanding is that the most effective, and possibly the only, way to go after terrorist groups is by attacking the source of their funding.

### *B. Statutory Language*

The plain language of the statute further supports an expansive view that includes financial institutions.

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<sup>129</sup> 18 U.S.C. § 2339A (2012).

<sup>130</sup> *Id.* § 2339B.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 2339C.

<sup>133</sup> *See Sant, supra* note 7, at 540-43.

### 1. "International Terrorism"

One of Sant's principal arguments is that Congress could not have intended to extend liability to financiers because the term "international terrorism," defined as activities that "involve violent acts or acts dangerous to human life," does not include donating money or providing financial services.<sup>134</sup> As argued in *Boim III*, giving money to a known terrorist group is an act dangerous to human life in the same way as giving a gun to a child.<sup>135</sup> Notably, the definition of international terrorism does not include a requirement that the conduct be intentional or even knowing.<sup>136</sup> *Boim III* and the courts that have followed its course have all concluded that negligent conduct will not satisfy the statute, as treble damages are generally not available for mere negligence.<sup>137</sup> However, if recklessness is sufficient, as *Boim III* and others have advocated, the knowing provision of support to a terrorist group such as Hamas clearly qualifies.

The Restatement of Torts defines recklessness as engaging in an activity "knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."<sup>138</sup> Further, in contrasting recklessness from negligence, the Restatement explains:

"[N]egligence" excludes conduct which the actor does or should realize as involving a risk to others which is not merely in excess of its utility, but which is out of all proportion thereto and is therefore "recklessly disregarding of the interests of others." As the disproportion between risk and utility increases, there enters into the actor's conduct a degree of culpability which approaches and finally becomes indistinguishable from that which is shown by conduct intended to invade similar interests. Therefore, where this disproportion is great, there is a marked tendency to give the conduct a legal effect closely analogous to that given conduct which is intended to cause the resulting harm.<sup>139</sup>

This language generally tracks the language in the international terrorism definition, and indicates a level of culpability that is consistent with a punitive, treble damages

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<sup>134</sup> *Id.* at 537.

<sup>135</sup> *See supra* Part I.C.

<sup>136</sup> *See* 18 U.S.C. § 2331.

<sup>137</sup> *See Gill v. Arab Bank PLC.*, 893 F. Supp. 2d 474, 497 (E.D.N.Y. 2012).

<sup>138</sup> RESTATEMENT (SECOND) OF TORTS § 500 (1965).

<sup>139</sup> *Id.* § 282.

civil remedy. Further, it is clear that knowingly providing support to a terrorist group satisfies this requirement. Though the utility of providing support to a terrorist group, assuming the group also engages in positive, humanitarian efforts, could conceivably be relatively high, the magnitude of risk is still sufficiently exorbitant to qualify as reckless. Magnitude of risk involves both probability and scope of potential harm.<sup>140</sup> For a group such as Hamas, which has engaged in numerous attacks over a long period and has expressly stated a desire to eradicate an entire group of people,<sup>141</sup> the probability that the group will use the support to facilitate an attack that will injure people like David in *Boim I* is very high, at least as great as the probability that a child provided with a loaded gun will cause harm to himself or another. Further, the scope of potential harm is astronomical, as Hamas and other terrorist groups generally target areas with large groups of victims to ensure maximum impact.<sup>142</sup>

That Congress viewed the provision of support to terrorist groups as an “act dangerous to human life” is further supported by the fact that Congress later criminalized this very activity, alongside other activities, such as hijacking an airplane, that are traditionally thought to be acts dangerous to human life.<sup>143</sup> Moreover, the fact that the statute specifically says “involve violent acts” rather than just “violent acts,” suggesting that Congress intended to expand liability to acts that, while not inherently violent, contribute to the overall violence of the terrorist attack.<sup>144</sup>

## 2. Other Language

Further, other language in the statute supports an expansive view. The fact that Congress created a civil cause of action without expressly stating the elements of such a cause of action suggests that they intended for the claim to include the general elements and principles of tort liability.<sup>145</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> *See* *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 694 (7th Cir. 2008) (describing Hamas as “gunning for Israelis”).

<sup>142</sup> *See Gill*, 893 F. Supp. 2d at 485.

<sup>143</sup> 18 U.S.C. § 2331(1)(A) (2012).

<sup>144</sup> *Id.*; *Gill*, 893 F. Supp. 2d at 482 (quoting from Section 2331 and emphasizing the statute’s use of the word “involve”).

<sup>145</sup> *See Gill*, 893 F. Supp. at 522.



Further, the House report contains sections on limitations to the civil cause of action.<sup>146</sup> One such express limitation is that a plaintiff may not bring suit, or may be limited in discovery if the Attorney General determines it will impair a corresponding criminal action.<sup>147</sup> Another is that a plaintiff may not sue for injuries arising out of an act of war.<sup>148</sup> There is no mention on any limitation to the class of people to which a plaintiff may sue.

### 3. Policy

There are two primary policy justifications for providing a civil remedy to victims of terror. The first is providing the victim with justice and relief.<sup>149</sup> The second is punishing and hopefully hindering or even incapacitating terrorist groups in order to prevent future attacks.<sup>150</sup> Both of these policy goals are furthered by expanding liability beyond the principal terrorist actors to those who provide the actors with support.

The first way in which these policy goals are furthered is that given the lower standard of proof and expanded discovery, civil trials are more likely to lead to findings of liability than criminal trials.<sup>151</sup> Thus, as a general matter, the more people involved with terrorism that a victim may sue, the greater the remedy to the victim and the stronger the penalty to the terrorist. This is particularly true when dealing with banks, where the expanded discovery afforded in civil cases allows plaintiffs to get past bank secrecy laws that may pose a greater barrier in criminal cases.<sup>152</sup>

The second way these policy goals are furthered is that, terrorist groups are exceedingly hard to sue civilly, or even criminally, for a number of reasons: they are intentionally covert; they rarely have any contact in the United States; and they often have few assets, certainly not enough to satisfy a judgment following a large attack.<sup>153</sup> Thus, a potential plaintiff would face numerous obstacles, and likely an eventual dead

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<sup>146</sup> H.R. REP. NO. 102-1040, at 3 (1992).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *See id.* at 4.

<sup>150</sup> *See generally Anti-Terrorism Act Hearing.*

<sup>151</sup> John F. Murphy, *Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects*, 28 REV. LITIG. 315, 315-16 (2008).

<sup>152</sup> *See Sant, supra* note 7, at 562.

<sup>153</sup> *Id.* at 546; *see also* Boim v. Holy Land Found. for Relief & Dev. (Boim III), 549 F.3d 685, 691(7th Cir. 2008).

end, in trying to sue a foreign terrorist group in an American court. Though § 2333 gives the courts subject matter jurisdiction, it is unlikely a plaintiff would be able to establish that a group such as a Hamas would have sufficient contacts with the United States for personal jurisdiction.<sup>154</sup> Even in the exceedingly rare case where a terrorist group had contacts in the U.S. and was brought to the U.S. to stand trial, it is likely the group would have only minimal attachable assets in the U.S., certainly not enough to satisfy a wrongful death action.<sup>155</sup> These issues are all illustrated in cases such as *Klinghoffer* and many others. The financial supporters of terrorist groups, on the other hand, are often large businesses with substantial assets and sufficient contacts in the United States to establish personal jurisdiction.<sup>156</sup>

Indeed, Sant concedes that were the civil remedy limited to the terrorist actors, suits would be rare and monetary awards almost non-existent. Though Sant contends that this was Congress's intent, it seems counterintuitive that Congress would create a remedy that actually did not provide any real remedy. Rather, it is more likely, especially in the context of the vigorous fight against terrorism, that Congress would intend that the remedy reach as far as the courts were willing to allow it, so as to most effectively achieve its twin goals of fighting terrorists and compensating victims.

#### IV. PROXIMATE CAUSE IS PROPER LIMITATION ON CIVIL LIABILITY

Given the strong considerations supporting the expansion of civil liability to include supporters of terrorism, it is not surprising that most courts dealing with § 2333 have recognized the potential for claims against at least some class of material supporters.<sup>157</sup> However, even among these courts there is still wide disagreement about where to draw the line. As seen in Part I, some courts still allow claims premised on aiding and abetting liability, which has no proximate cause requirement and instead focuses on intent as the cutoff in liability.<sup>158</sup> Other

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<sup>154</sup> See *Murphy*, *supra* note 151, at 323-24.

<sup>155</sup> *Id.* at 327; Sant, *supra* note 7, at 546.

<sup>156</sup> See Adam N. Schupack, *The Arab Israeli Conflict and Civil Litigation Against Terrorism*, 60 DUKE L.J. 207, 238 (2010).

<sup>157</sup> See *Gill v. Arab Bank PLC.*, 893 F. Supp. 2d 474, 497-502 (E.D.N.Y. 2012) (discussing different courts' approaches).

<sup>158</sup> See *supra* Part I.

courts have focused on the claims as ones of primary liability, and thus have used proximate cause, rather than intent, as the cutoff. As will be discussed below, proximate cause provides the most useful cutoff for these claims, as it not only incorporates intent but addresses the primary concerns voiced by those who worry about extending liability too far.

A. *Secondary Liability is Too Expansive*

Aside from the issue that secondary liability might not even be available under § 2333 due to *Central Bank*, its reliance on intent as a cutoff on liability is inadequate. The initial summary judgment ruling against HLF in *Boim I* is illustrative of the problem. After ruling that aiding and abetting liability was available and dismissing HLF's motion to dismiss, the district judge noted that under such a theory, the Boims could prevail if they proved that HLF knowingly provided material support to Hamas.<sup>159</sup> In 2001, the Treasury Department pursuant to an executive order seized HLF's assets following an investigation that revealed it had ties to Hamas.<sup>160</sup> HLF challenged its designation as a terrorist group in federal court, and the decision was upheld by a district court and affirmed by the D.C. Circuit in 2003.<sup>161</sup> The D.C. Circuit recounted the district courts summary of the administrative record, which described HLF's ties to Hamas in general terms, such as "HLF has had financial connections to Hamas since its creation in 1989," and "FBI informants reliably reported that HLF funds Hamas."<sup>162</sup> The Boims then moved for summary judgment against HLF, arguing that through collateral estoppel, there was no issue of material fact as to one required element, namely that HLF knowingly provided material support to Hamas.<sup>163</sup> The district court agreed and granted summary judgment.<sup>164</sup>

The district court never even addressed the connection between HLF's alleged monetary donations and the attack that killed David Boim. David Boim was killed in 1996. The Treasury Departments report explains only that HLF had economic ties to Hamas as far back as 1989. It does not detail any specific

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<sup>159</sup> *Boim v. Quranic Literacy Inst. (Boim I)*, 291 F.3d 1000, 1015 (7th Cir. 2002).

<sup>160</sup> *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 701 (7th Cir. 2008).

<sup>161</sup> *Id.*

<sup>162</sup> *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 902 (N.D. Ill. 2004).

<sup>163</sup> *Id.*

<sup>164</sup> *Boim III*, 549 F.3d at 705.

donations or whether the donations were made to particular segment of Hamas. Such general allegations of long-term financial ties may be sufficient for a seizure of assets or a criminal conviction, but there must be some further information that it some way ties to HLF's donation to the attack that killed David Boim. This evidence may consist of specific donations close in time to the 1996 donation, a substantially large donation made to the terrorist arm of Hamas, or even some evidence indicating that at the time HLF made its donations in the early 90s, the first years of Hamas' existence, they knew or had reason to know Hamas was engaged in carrying out attacks against civilians. Under the aiding and abetting framework used by the *Boim* district court, if HLF today severed all ties with Hamas and never made another donation to them, they could nonetheless conceivably be perpetually liable to any victim of a future Hamas attack. Thus, without making some effort to tie the defendant's support to the plaintiff's particular injuries, the potential scope of § 2333 liability is too expansive.

*B. Cause in Fact is Too Limiting*

On the other hand, requiring the plaintiffs to show that their injury would not have occurred but for the defendant's support is equally problematic as this would effectively preclude claims against any supporters. One basic problem with requiring but for cause in these cases is the issue of proof. With so many streams of money and supplies being funneled to terrorist groups, it would be virtually impossible for plaintiffs to isolate a particular donation as being involved in the commission of the attack that caused their injuries. Another fundamental issue with applying cause in fact to these cases is the problem of the fungibility of money.<sup>165</sup> A group like Hamas conceivably has numerous sources of support and substantial money in its reserve. Thus, were a particular group, such as HLF, to decide to withhold its donation, Hamas could move money that was allotted for another project in order to make up this shortfall and fund its next attack. In this sense, HLF's monetary support cannot be said to be a but for cause of any particular Hamas attack.

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<sup>165</sup> *Id.* at 698.

Some courts have recognized this issue and decided to apply a “substantial factor” test instead.<sup>166</sup> This is the proper approach. To do otherwise would leave most victims without a remedy and effectively insulate terrorist groups and their financiers from liability. While it is impossible to prove that a particular donation caused a particular attack, it is undeniable that any significant provision of support to a terrorist group will substantially facilitate future attacks. The substantial factor test will encompass these significant donations that, though they cannot be tied directly to a particular attack, clearly played a role in bringing about the attack. Proximate cause presents the best cutoff for liability.

Proximate cause provides the best cutoff for liability in these cases. Two characteristics of proximate cause make it particular useful as a cutoff for liability. First, because proximate cause is an abstract, legal concept, rather than a logical one, it is able to incorporate many considerations, including mental state and timing. While, as discussed above, mental state by itself does not provide a suitable measure of liability in these cases, it weighs heavily in the ultimate determination, and proximate cause allows mental state to be considered in context along with other important factors. Relatedly, as will be discussed further below, factors such as mental state and timing are codependent. A donation made to Hamas intending to support its terrorist activities may lead to liability further into the future than a donation made recklessly. Proximate cause takes all of these considerations into account.

Second, proximate cause’s focus on foreseeability and intervening cause both usefully track culpability in this context and protect against the two main concerns associated with § 2333 liability. Under traditional proximate cause formulations, an actor only faces liability for actions that are reasonably foreseeable results of the action.<sup>167</sup> Similarly, an intervening act cuts off liability where it is not foreseeable.<sup>168</sup> The first concern with § 2333 is that civil liability could be extended to a potentially endless class of groups and individuals that provide even the most remote support to a terrorist group. An example discussed in the *Boim III* dissent is the political group that has a member of Hamas speak at its convention. In the abstract, it does not seem reasonably foreseeable that inviting a Hamas member to speak will result in a Hamas attack. Thus, the

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<sup>166</sup> See e.g. *id.*; see also *Gill v. Arab Bank PLC.*, 893 F. Supp. 2d 474, 507 (E.D.N.Y. 2012).

<sup>167</sup> Jim Gash, *At The Intersection of Proximate Cause and Terrorism: A Contextual Analysis of the Proposed Restatement of Torts*, 91 KY. L.J. 523, 586 (2003).

<sup>168</sup> *Id.*

subsequent attack would be a superseding intervening cause cutting off liability for the political group. On the other hand, it is reasonably foreseeable in the abstract that a knowing donation of money or weapons to Hamas will lead to an attack, and thus a subsequent attack would rightfully not cut off liability for these donors, who have provided Hamas with material assistance and thus would and should be culpable.

The second main concern with extending § 2333 liability to supporters is that it will lead to perpetual liability for all future attacks conducted by the terrorist group. Again, this concern is addressed by proximate cause. As discussed further below, the greater the time period is between donation and attack, the less foreseeable it is that the donation would lead to such an attack. That is, it is foreseeable that a large donation made to Hamas in 2013 will result in an attack in 2013 but not in 2050. Where the line is ultimately drawn will be a case by case decision, but the threat of perpetual liability is eliminated.

### C. *Proximate Cause Model*

Having determined that proximate cause provides the most useful cutoff in these cases, the final question is what the test for proximate cause will be in these cases. Courts have taken many different approaches. As seen above, *Boim III* essentially concludes that any provision of support to a terrorist group, if made at least recklessly, would satisfy proximate cause.<sup>169</sup> The dissent in *Boim III* criticized this approach as too expansive, as have other courts.<sup>170</sup> The Second Circuit has not provided much guidance, concluding only that a showing of proximate cause requires more than the “fairly traceable” standard used to determine standing.<sup>171</sup>

The Eastern District of New York in *Gill* has come the closest to providing a workable framework for determining proximate cause in these cases. Unlike *Boim III*, which turns proximate cause into a yes-no question, the court in *Gill* treats proximate cause essentially as a sliding scale with multiple factors, including mental state, timing, and nature of donation. Thus, the court concludes, “[A] major recent contribution with a malign state of mind would—and should—be enough . . . . But a small contribution made long before the event—even if

<sup>169</sup> See generally *Boim III*, 549 F.3d at 695-700.

<sup>170</sup> *Id.* at 711-12 (Rovner, J., concurring in part and dissenting in part); *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 645 (S.D. Tex. 2011).

<sup>171</sup> *Rothstein v. UBS AG*, 708 F.3d 82, 92 (E.D.N.Y. 2013).

recklessly made—would not be. The concept of proximate cause is central in imposing a balance.”<sup>172</sup>

### 1. Mental State

Mental state is perhaps the most important, and also most complex, factor in this formulation. Not only must the court determine what level of mental state to require, but it must also determine which facts to apply the mental state to. For example, in *Gill*, the court concluded that the defendant must be at least reckless not only to the fact that the group to which it made donations was engaged in terrorist activities but also that it targeted Americans.<sup>173</sup> On the other hand, a Texas district court recently concluded that recklessness was not sufficient, holding that defendant must know or intend both of these elements.<sup>174</sup>

Requiring recklessness in these cases makes more sense, as proving knowledge or intent would be exceedingly difficult and place an undue burden on plaintiffs. Many terrorist groups are large organizations with many branches and fronts that carry out non-violent humanitarian activities in addition to its terrorist activities. As such, it would be very difficult, if not impossible, to prove that a defendant who provided support to a front or earmarked its support for humanitarian efforts actually knew or intended that this support would be used to facilitate terrorist activity. This concern was voiced by the dissent in *Boim III*.<sup>175</sup> However, as the majority in *Boim III* reasoned, the violent nature of Hamas and other terrorist groups are so notorious that any donation, even if made with innocent intent, is a dangerous activity.<sup>176</sup> It was exactly this thinking that led Congress to pass § 2339B in order to supplement § 2339A in the material support criminal provisions. Section 2339A criminalizes material support made with the intent to further terrorist activities, thus allowing a donor to escape liability by earmarking its donation for humanitarian purposes.<sup>177</sup> Section 2339B closed this loophole

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<sup>172</sup> *Gill v. Arab Bank PLC.*, 893 F. Supp. 2d 474, 507 (E.D.N.Y. 2012).

<sup>173</sup> *Id.* at 506.

<sup>174</sup> *Abecassis*, 785 F. Supp. 2d at 635-36.

<sup>175</sup> *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 706 (7th Cir. 2008) (Rovner, J., concurring in part and dissenting in part).

<sup>176</sup> *See id.* at 698.

<sup>177</sup> 18 U.S.C. § 2339A (2012).

by holding a donor liable so long for any donation made to a designated terrorist group, regardless of the donor's intent.<sup>178</sup>

## 2. Time

The second important factor is time. As discussed above, a principal concern of the detractors is potentially perpetual, ruinous liability. It is generally not reasonably foreseeable that a donation will result in an attack 20 years down the line. Rather than setting a fixed cutoff, the question of temporal proximity will be a fact-specific and case-by-case question. It will also be dependent on the other two factors in the analysis. Thus, where an individual makes a large donation to a known terrorist group, it is reasonably foreseeable that the donation will facilitate attacks further into the future than a small donation made to a relatively unknown group.

## 3. Nature of Support

The final factor in the analysis is the nature, particularly the size, of the support. It is foreseeable that a large monetary donation will facilitate terrorist activity, whereas with a small donation or verbal support, it is not reasonably foreseeable. For example, it is not necessarily reasonably foreseeable that a five dollar donation to Hamas will result in an imminent attack. Conversely, it is highly foreseeable that continuously funneling large amounts of money will facilitate an attack.

The result of these factors is a sliding scale and balancing test. Thus, on one end of the spectrum are large monetary donations made to a well-known terrorist group within a short time of the attack in question. On the other end are small donations to unknown groups far removed from the attack that injured plaintiff. In between, the court will engage in fact-specific analysis using the three factors discussed above. This measured approach will best ensure that victims are compensated and terrorist are punished, while avoiding potentially ruinous liability for marginally involved third parties.

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<sup>178</sup> *Id.* § 2339B.



## CONCLUSION

Since September 11, 2001, the United States has engaged in many, largely reactive measures designed to prevent the next terrorist attack. The civil remedy of § 2333 provides one of the more promising proactive avenues in the fight against terrorism. By allowing citizens to secure judgments against those who fund and supply terrorists, the civil remedy could potentially have a real impact in interrupting the terrorist groups' activities, while also providing victims with actual relief. In pursuit of these goals, the courts should interpret § 2333 broadly, allowing claims against those who materially support terrorist activity, so long as there is sufficient proximate cause between the support and the particular attack that injured the plaintiff. Through this approach, the civil cause of action will provide an adequate remedy to victims and bring those responsible to justice.

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# Special Immigrant Juvenile Status

## THE NEED TO EXPAND RELIEF

### INTRODUCTION

The Immigration Nationality Act<sup>1</sup> (INA) has a long history of failing to provide special relief or, at a minimum, special consideration for child immigrants.<sup>2</sup> Criticism of the immigration system reached new levels of concern in the last year as the number of undocumented minors crossing the southern border of the United States significantly increased.<sup>3</sup> Special Immigrant Juvenile Status (SIJS) provides children under the age of 21 with the opportunity to apply for status as a Legal Permanent Resident<sup>4</sup> (LPR).<sup>5</sup> SIJS represents the first and to date only “child-centered” immigration remedy incorporating the traditional “best interest” standard applied in proceedings related to children.<sup>6</sup>

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<sup>1</sup> The INA was the first consolidated immigration legislation enacted in 1952. Prior to the INA, immigration law was not organized into one cohesive code section. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as 8 U.S.C. § 1158).

<sup>2</sup> David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393, 393 (2010).

<sup>3</sup> Julia Preston, *Rush to Deport Young Migrants Could Trample Asylum Claims*, N.Y. TIMES (July 20, 2014), available at [http://www.nytimes.com/2014/07/20/us/rush-to-deport-young-migrants-could-trample-asylum-claims-.html?\\_r=0](http://www.nytimes.com/2014/07/20/us/rush-to-deport-young-migrants-could-trample-asylum-claims-.html?_r=0) (noting that between October of 2013 and July of 2014, 57,000 undocumented minors have crossed the border, marking a 92% increase from prior years); Kirk Semple, *Youths Facing Deportation to Be Given Legal Counsel*, N.Y. TIMES (June 6, 2014), available at <http://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html?emc=eta1>.

<sup>4</sup> Lawful Permanent Residence provides a path to citizenship and is colloquially referred to as a “green card.” *Green Card*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/greencard> (last updated May 13, 2011).

<sup>5</sup> Wendi J. Adelson, *Case of the Eroding Special Immigrant Juvenile Statue*, 18 J. TRANSNAT’L L. & POL’Y 65, 76 (2008) (noting that SIJS relief is especially coveted because it allows for instantaneous application for LPR status upon receipt of the SIJS visa, whereas, many immigration relief options require a significant waiting period between obtaining certification and adjusting to status as a LPR).

<sup>6</sup> David B. Thronson, *Kids will be Kids? Reconsidering Conception of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L. J. 979, 1008 (2002) [hereinafter Thronson, *Kids*]; David B. Thronson, *You Can’t Get Here From Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL’Y & L. 58, 68 n.41 (2006) [hereinafter Thronson, *You Can’t Get Here From Here*].

Obtaining SIJS relief involves multiple stages of review by both state officials and federal immigration officers. First, a juvenile must secure a *special findings order*<sup>7</sup> from a state juvenile court. The order must state that: 1) the child is dependent upon the juvenile court<sup>8</sup> or “legally committed to, or placed under the custody of, an agency or department of a state, or an individual or entity appointed by a state or juvenile court”; 2) reunification of the child with one or both parents “is not viable due to abuse, neglect, abandonment, or similar basis found under State law”; 3) return of the child to his or her home country would not be in the child’s best interest; and 4) the child is unmarried and under the age of 21 at the time of filing.<sup>9</sup>

Second, the special findings order is sent along with the special immigrant petition (Form I-360<sup>10</sup>) to United States Citizenship and Immigration Services (USCIS),<sup>11</sup> which determines whether to accept or reject the order and thus grant SIJS status.<sup>12</sup> Obtaining a special findings order is the most important hurdle in the application process because USCIS defers to the state court’s determination as to the four factual findings necessary to merit SIJS relief.<sup>13</sup>

Third, once granted SIJS status, an applicant is automatically eligible to adjust to LPR status (Form I-485<sup>14</sup>)

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<sup>7</sup> The orders issued by family courts with the findings necessary for a SIJS application are generally referred to as “special findings orders.” N.Y. STATE, OFFICE OF CHILDREN & FAMILY SERVS., ADMINISTRATIVE DIRECTIVE 4 (Feb. 7, 2011), available at [http://www.ocfs.state.ny.us/main/policies/external/OCFS\\_2011/ADMs/11-OCFS-ADM-01%20Special%20Immigrant%20Juvenile%20Status%20%28SIJS%29.pdf](http://www.ocfs.state.ny.us/main/policies/external/OCFS_2011/ADMs/11-OCFS-ADM-01%20Special%20Immigrant%20Juvenile%20Status%20%28SIJS%29.pdf).

<sup>8</sup> A juvenile court is “a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.” 8 C.F.R. § 204.11(a) (2011).

<sup>9</sup> Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2012); Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606, 606 (2012). The definition for “child” in INA 101(b) requires the status of “unmarried.” 8 U.S.C. 1101(b)(1).

<sup>10</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., OMB No. 1615-0020, I-360: PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT (Mar. 5, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-360.pdf>.

<sup>11</sup> 8 U.S.C. § 1101(a)(27)(J); *Eligibility Status for SIJS*, Memorandum from William R. Yates, Assoc. Dir. for Operations, Immigration & Customs Enforcement, to Regional Dirs. & Dist. Dirs. 2 (May 27, 2004), available at [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2004/sij\\_memo\\_052704.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf); U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij> (last updated July 12, 2011).

<sup>12</sup> Thronson, *You Can’t Get Here From Here*, *supra* note 6, at 1007-08.

<sup>13</sup> See *id.* at 1006. The USCIS officer is mostly concerned that the findings put forth in the state court special findings order fulfill the statutory requirements, but she does not adjudicate the findings. *Id.*

<sup>14</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., OMB No. 1615-0023, FORM I-485: APPLICATION TO REGISTER PERMANENT RESIDENCE OR

which, if granted, would make a child eligible for a work permit, driver's license, subsidized health insurance, and financial aid for higher education.<sup>15</sup> Applicants are advised to apply concurrently for SJIS and LPR status.<sup>16</sup> Generally after five years in LPR status, SJIS beneficiaries qualify for naturalization.<sup>17</sup> A SIJS beneficiary is restricted from sponsoring a parent for immigration status.<sup>18</sup>

This note explores the problems that undocumented children who live in homes where there is domestic violence face when they seek SIJS relief. The increasing popularity of SIJS among immigration advocates gives the impression that SIJS is a comprehensive form of child-specific immigration relief. However, in actuality, SIJS was meant to protect only the most vulnerable undocumented children and to this day is an inadequate statutory and regulatory scheme to recognize which youth are the most vulnerable.

The following true stories illustrate the tension that results from the lack of clear regulatory guidance to ensure that children who live in homes where there is domestic violence have a path to SIJS relief.

*Jane<sup>19</sup> has three brothers and three sisters, who all recently moved from Albania to the United States with their parents. Each member of Jane's family is undocumented. Her father planned for the whole family to gain status as derivatives on his individual asylum application, but his application was denied. Jane's father has physically and emotionally abused each of the children, as well as Jane's mother, for the last 15 years. Jane's mother had no recourse or option for escape in Albania and unsuccessfully sought immigration protection in the United States as a result of the abuse. Jane was hopeful that she and her siblings might qualify for some type of relief. The family was in and out of criminal and civil family courts to enforce multiple orders of protection against the father. During a civil*

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ADJUST STATUS (June 20, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-485.pdf>.

<sup>15</sup> Kristen Jackson, *Special Status Seekers*, 34 L.A. LAWYER 20, 23 (2012); Meghan Johnson & Yasmin Yavar, *Uneven Access to Special Immigration Juvenile Status: How the Nebraska Supreme Court Became an Immigration Gatekeeper*, 33 CHILD. LEGAL RTS. J. 63, 72 (2013).

<sup>16</sup> Maura M. Ooi, Note, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief For Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 890 (2011).

<sup>17</sup> Memorandum from William R. Yates, to Regional Dirs. and Dist. Dirs., *supra* note 11, at 2.

<sup>18</sup> 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2012); Thronson, *Kids*, *supra* note 6, at 1008.

<sup>19</sup> Jane is a fictional name assigned to the actual child in this litigation.

family court proceeding, Jane followed a legal advocate's suggestion and made a motion for special findings from the family court that, if granted, would enable her to apply for SIJS.<sup>20</sup>

Susy was born in Honduras, where she lived alone with her mother. Susy never lived with her father and grew up with the knowledge that he was a violent alcoholic who had abused his wife. When Susy was 10, her mother left for the United States. Susy and her younger brother Jason were left in the care of their Aunt Estella. Estella physically, emotionally, and verbally abused Susy and Jason until twelve-year-old Susy arranged for "coyotes" to smuggle Jason and her to the United States.

Upon arrival at the United States and Mexico border, their group encountered border patrol authorities and immediately ran back into Mexico. Susy and Jason were both apprehended<sup>21</sup> and spent 80 days at a detention group home until their Uncle Francisco picked them up and took them to live with him in New York.<sup>22</sup>

Susy explained to a state juvenile court in a guardianship proceeding initiated by her Uncle that:

*At first it was hard adjusting to a new place and a new language but I now feel a lot more comfortable in the United States and I have friends. It is the first time I feel safe and taken care of as a child—it is a wonderful feeling to be provided for and be part of a loving family . . . I see my mother who lives close by with her boyfriend and their baby daughter but my caretaker and head of family is Francisco. I am happy living with him and his family.*

Susy also petitioned for special findings with hope she would benefit from SIJS relief.<sup>23</sup>

In the fall of 2013, Susy received the state juvenile special findings order necessary to apply for SIJS, while Jane's only option was to appeal her denial of the same findings.<sup>24</sup>

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<sup>20</sup> Facts adapted from a Family Court Decision by Honorable Ilana Gruebel [hereinafter Family Court Decision], *rev'd*, No. O-9277-12, 2015 WL 1447564 (N.Y. App. Div. Apr. 1, 2015) (July 29, 2013) (on file with author).

<sup>21</sup> Susy escaped, but when she realized that Jason was apprehended, she traveled back to the border to ensure that Jason would not be alone.

<sup>22</sup> Matter of Marcelina M.-G. v. Israel S., 973 N.Y.S.2d 714, 714-17 (App. Div. 2013).

<sup>23</sup> *Id.* The procedural posture of the case is much more complicated than the summary of facts indicates. Susy's mother eventually petitioned for custody of Susy in competition with the uncle's guardianship proceeding. Ultimately, the Appellate Division affirmed Susy's mother's competing custody petition for Susy and granted Susy SIJS relief. *Id.* at 721.

<sup>24</sup> *Id.* at 725; Family Court Decision, *supra* note 20. In fact, Jane's appeal resulted in a reversal of the Family Court's order. See *Fifo v. Fifo*, No. O-9277-12, 2015 WL 1447564 (N.Y. App. Div. Apr. 1, 2015). The Second Appellate Department found that the order of protection issued on her behalf against her father established the necessary dependency required by SIJS. *Id.* at \*2.

This note focuses on the need to expand relief to children like Jane. Specifically, that in order to provide explicit SIJS eligibility for undocumented children who live in homes where there is domestic violence, USCIS should issue a new federal regulation or an official legal memorandum to explicitly include a child who a juvenile court has intervened to protect from domestic violence in the home as dependent upon a juvenile court so that they qualify for a special findings order.<sup>25</sup> Part I explains that SIJS was initially intended as an immigration relief only for children in long-term state foster care, a story often untold amidst SIJS advocates today. Part II focuses on two 2008 SIJS amendments that clearly indicate Congress intended to expand the pool of children eligible for SIJS relief. Part II also illustrates the imperfect nature of the expansion and how children in homes where there is domestic violence are likely to be prejudiced by the modern SIJS statute. Part III then argues that USCIS should promulgate a rule offering specific guidance to state courts that would help ensure a clear path to SIJS relief for children who live in homes where there is domestic violence.

## I. UNDERSTANDING SIJS

SIJS was introduced to protect undocumented, minor immigrants eligible for long-term foster care in 1990.<sup>26</sup> It has been substantively amended twice, first in 1997 (1997 Amendments)<sup>27</sup> and most recently in 2008 (2008 Amendments).<sup>28</sup> The type of child seeking SIJS relief drastically changed after the 2008 Amendments.<sup>29</sup> Advocates enthusiastically embraced SIJS, hoping it was a step toward more comprehensive, child-specific

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<sup>25</sup> See *infra* Part I.A.

<sup>26</sup> Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993). Prior to the enactment of SIJS, immigration relief had been offered to children for a limited period of time under the Immigration Reform and Control Act of 1986, however, those benefits were only extended for a particular group of children who had been in the United States prior to 1982. *Id.*

<sup>27</sup> Immigration and Nationality Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (1997).

<sup>28</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, & 22 U.S.C.).

<sup>29</sup> Mandelbaum & Steglich, *supra* note 9, at 608; Memorandum from Donald Neufeld, Acting Assoc. Dir: Domestic Operations, U.S. Dep't of Homeland Sec., to Field Operations (Mar. 24, 2009), available at [http://uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/TVPRASIJ.pdf](http://uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRASIJ.pdf); see *infra* Part II for more discussion about this change.

immigration relief.<sup>30</sup> Regrettably, state case law indicates there remains significant confusion as to who is eligible for the state special findings order that is essential for SIJS relief.<sup>31</sup>

In many ways, SIJS was initially envisioned as a narrow solution to a pre-existing state child welfare crisis.<sup>32</sup> Several advocates in the state of California noticed that vulnerable children in the foster care system had a particularly difficult path to citizenship.<sup>33</sup> With the encouragement of a local Congressman, Ken Borelli, the then-Deputy Director for Child Welfare in Santa Clara County, California, drafted the beginnings of SIJS legislation.<sup>34</sup> As the bill was passing through Congress, it gained support from child-welfare workers across the state of California who realized that a large number of children who aged out of the state foster care system lacked immigration status.<sup>35</sup> As a result, these children found it difficult to live balanced and stable lives.<sup>36</sup> The product of the California based efforts was SIJS, a relief the advocates intended exclusively to stabilize foster care children.<sup>37</sup> SIJS provided foster care children with the opportunity for a green card and, as a result, federal benefits and legitimate employment.<sup>38</sup> SIJS relief led to an improvement on the quality of life for foster care children because “[e]ligibility for federal benefits correlates directly with improved socioeconomic status and health.”<sup>39</sup> To be sure, SIJS also benefited the state of California because federal benefits “decrease[] reliance on wholly state-funded services provided to undocumented immigrants.”<sup>40</sup>

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<sup>30</sup> Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 252-53 (2010).

<sup>31</sup> Theo S. Liebmann, *Keeping Promises to Immigrant Youth*, 29 PACE L. REV. 511, 512 (2009).

<sup>32</sup> Email from Ken Borelli, Retired Deputy Dir. for Child Welfare in Santa Clara County, Cal., to author (Oct. 25, 2013) (on file with author).

<sup>33</sup> Email from Ken Borelli, Retired Deputy Dir. for Child Welfare in Santa Clara County, Cal., to author (Feb. 16, 2015) (on file with author).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*; Email from Ken Borelli, to author, *supra* note 32.

<sup>36</sup> *Id.* An undocumented immigrant's inability to access legal employment or health insurance, higher rates of poverty, and constant threat of deportation generally contribute to instability. Theo Liebmann, *Ethical Advocacy For Immigrant Survivors of Family Crisis*, 50 FAM. CT. REV. 650, 655 (2012).

<sup>37</sup> *Id.*

<sup>38</sup> Jennifer Baum et al., *Most in Need But Least Served: Legal and Practical Barriers to Special Immigrant Juvenile Status for Federally Detained Minors*, 50 FAM. CT. REV. 621, 623 (2012).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

Under the original Act, eligibility depended upon whether the child established that: 1) she was declared dependent on a juvenile court; 2) she was eligible for long-term foster care; and 3) it was contrary to her best interest to return to her home country.<sup>41</sup> A child in Jane's or Susy's position would not have qualified because neither were eligible for foster care.

At the time SIJS was enacted, it was not controversial and barely drew attention at floor debate.<sup>42</sup> In fact, only 28 commentators weighed in to question the rather narrow procedural issue of how SIJS beneficiaries would adjust to LPR status.<sup>43</sup> Unfortunately, the lackadaisical attitude toward SIJS quickly changed seven years later.

In 1997, Congress drastically amended SIJS.<sup>44</sup> Senator Pete Domenici from Arizona<sup>45</sup> alleged that undocumented, un-detained immigrant children severely abused SIJS relief.<sup>46</sup> Specifically, he complained, "this is a giant loophole . . . every visiting student from overseas can have a petition filed in a state court . . . declaring that they're a ward and in need of foster care, . . . [and] they're granting them."<sup>47</sup> In an attempt to "define

<sup>41</sup> 8 U.S.C. § 1101 (a)(27)(J) (2012); Immigration Act of 1990, 1990 Pub. L. No. 101-649, 104 Stat. 4978 § 153 (1990); Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children From Their (Evil) Step-Uncle Sam, or How To Ameliorate The Impact of The 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L. J. 237, 241 (2006); Mandelbaum & Steglich, *supra* note 9, at 607.

<sup>42</sup> Lloyd, *supra* note 41, at 241. The only recorded discussion at the acceptance of the 1990 SIJS act consisted of 28 commentators who questioned the potential difficulty involved for children granted SIJS visas adjusting to LPR status. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. 42843, 42848-49 (Aug. 12, 1993); Adelson, *supra* note 5, at 76; *see also* Carl Hulse, *Immigrant Surge Rooted in Law to Curb Child Trafficking*, N.Y. TIMES (July 8, 2014), available at [http://www.nytimes.com/2014/07/08/us/immigrant-surge-rooted-in-law-to-curb-child-trafficking.html?module=Search&mabReward=relbias%3Ar%2C%7B%2222%22%3A%22RI%3A18%22%7D&\\_r=0](http://www.nytimes.com/2014/07/08/us/immigrant-surge-rooted-in-law-to-curb-child-trafficking.html?module=Search&mabReward=relbias%3Ar%2C%7B%2222%22%3A%22RI%3A18%22%7D&_r=0) (describing the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 as "enacted quietly" continuing the under-the-radar approach to amendments related to SIJS).

<sup>43</sup> Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. at 42848-49; Adelson, *supra* note 5, at 76.

<sup>44</sup> Only some of the amendments are discussed in this note, although there were additional SIJS amendments which made it more difficult for children in federal custody to pursue SIJS relief. *See* 8 U.S.C. § 1101 (a)(27)(J)(iii)(I) (2012); Lloyd, *supra* note 41, at 240; *see* Ooi, *supra* note 16, at 890 (noting that the consent requirement presented a significant procedural hurdle to many perspective SIJS applicants who previously had unhindered access to juvenile courts).

<sup>45</sup> Lloyd, *supra* note 41, at 239.

<sup>46</sup> *Id.*

<sup>47</sup> *Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216, 221 (3d Cir. 2003) (citation omitted) (internal quotation marks omitted).



more restrictively the minors to whom SIJS status was available,” the 1997 Amendments specified that, in addition to being dependent upon a state juvenile court as eligible for long-term foster care, those eligible for SIJS must also demonstrate that their dependency upon the state was “due to abuse, neglect or abandonment.”<sup>48</sup> A Congressional Report at the time of the 1997 Amendments included a brief explanation as to the intent of the addition of “due to abuse, neglect, or abandonment:”

The language has been modified in order to limit the beneficiaries of this provision to those juveniles for whom it was created, *namely abandoned, neglected, or abused children*, by requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of the alien’s best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.<sup>49</sup>

The number of SIJS applicants noticeably decreased after the restrictive 1997 Amendments but then steadily rose for the next 11 years.<sup>50</sup> With a remarkable change of attitude, in 2008, Congress reversed course and drastically amended SIJS, resulting in increased access to relief.

## II. EXPANDING RELIEF: THE WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT

The 2008 Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA)<sup>51</sup> significantly expanded SIJS eligibility.<sup>52</sup> The TVPRA passed easily with little debate or attention, even though, since that time, advocates have demanded federal regulations to clarify the 2008 Amendments.<sup>53</sup>

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<sup>48</sup> Lloyd, *supra* note 41, at 239.

<sup>49</sup> 105 CONG. REC. H26615 (daily ed. Nov. 13, 1997) (emphasis added).

<sup>50</sup> Immigration and Nationality Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (1997); *see infra* Table 1. The chart indicates that SIJS beneficiaries decreased by approximately 140 between 1997 and 1998.

<sup>51</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, & 22 U.S.C.).

<sup>52</sup> Young & McKenna, *supra* note 30, at 252. Many provisions of the TVPRA, even some related to SIJS, are beyond the scope of this note but have been widely discussed elsewhere. For detailed review of all the changes to SIJS, see DEBORAH LEE ET AL., UPDATE ON LEGAL RELIEF OPTIONS FOR UNACCOMPANIED ALIEN CHILDREN FOLLOWING THE ENACTMENT OF THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008, at 3-4 (Feb. 19, 2009) (on file at AILA InfoNet, Doc. No. 09021830).

<sup>53</sup> *See* Specialized Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978, 54,979 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. pts. 204, 205, and 245); Hulse, *supra* note 42 (“Advocates saw it as a breakthrough on sex trafficking after Congress had

In fact, the 2008 Amendments were heralded as the “first major steps toward developing a more effective system to address the needs of unaccompanied children.”<sup>54</sup> In particular, eligibility was expanded so a child only needed to establish that reunification was not viable with “one or both parents”<sup>55</sup> rather than both parents.<sup>56</sup> Similarly, a child no longer needed to establish that she was eligible “for long-term foster care.”<sup>57</sup> Both of these 2008 Amendments broadened the scope of SIJS eligibility beyond foster care children.

Despite the benefits of the 2008 Amendments, immigrant children living in homes where domestic violence is prevalent may face difficulties accessing SIJS relief. Children continue to be arbitrarily precluded from special findings orders where the family court petitioner is a child’s parent or where the child is not in the “correct type” of family court dependency proceeding. The 2008 Amendments and the difficulties of applying the new language to juvenile court proceedings are explored in turn in the remainder of this section.

#### A. “One or Both Parents”

The 2008 Amendments show that Congress intended to “expand eligibility.”<sup>58</sup> Prior to the 2008 Amendments, before a state court could grant a special findings order, a child needed to show that reunification with both parents was impossible, which required establishing that both parents “effectively

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already scuttled an earlier attempt at broad immigration reform despite the strong backing of Mr. Bush. Just two House Republicans—Representative Jeff Flake of Arizona and Representative Paul Broun of Georgia—opposed the measure when it first passed the House in 2007, but it went through Congress without opposition and with little notice in the post-election session of 2008. Aides to Mr. Flake, now a senator, said he did not foresee the current problems but was more concerned about holding the line on federal spending at the time.”). The relationship between the regulations accompanying SIJS remain problematic today as regulations accepted in 2011 still await codification.

<sup>54</sup> Young & McKenna, *supra* note 30, at 252-53.

<sup>55</sup> Mandelbaum & Steglich, *supra* note 9, at 608; Memorandum from Donald Neufeld, to Field Leadership, *supra* note 29.

<sup>56</sup> Mandelbaum & Steglich *supra* note 9, at 608; Memorandum from Donald Neufeld, to Field Operations, *supra* note 29.

<sup>57</sup> Mandelbaum & Steglich *supra* note 9, at 608; Memorandum from Donald Neufeld, to Field Operations, *supra* note 29.

<sup>58</sup> In its commentary to the proposed regulations, USCIS recognizes that the “one or both parents” addition was intended to “expand eligibility” but fails to provide any guidance in the actual regulations which would encourage uniform state interpretation of the change. See *Specialized Immigrant Juvenile Petitions*, 76 Fed. Reg. at 54979; see also Mandelbaum & Steglich, *supra* note 9, at 608; Memorandum from Donald Neufeld, to Field Leadership, *supra* note 29.

relinquished control of the child.”<sup>59</sup> The traditional dual parent reunification requirement was closely linked to the necessity of showing that a child was eligible for long-term foster care. Prior to a child entering long-term foster care, courts must generally find that “family reunification is no longer a viable option” with either parent.<sup>60</sup> The dual parent reunification was initially intended to operate as an indication of the threshold vulnerability Congress thought SIJS beneficiaries should establish to merit the immigration benefit.<sup>61</sup> The elimination of dual parent reunification created opportunities for immigration relief for mostly non-foster care children, thereby lowering the vulnerability threshold necessary to qualify for SIJS.

The Second Appellate Department of the New York Supreme Court and state appellate courts in California and Minnesota recognize that through the 2008 Amendments, Congress intended to expand eligibility and thus extend SIJS eligibility to children who may have the option of reunification with one parent.<sup>62</sup> Despite the clear language of the amended statute, some jurisdictions interpret “one or both parents” to require a showing that reunification is not possible with either parent.<sup>63</sup> The Supreme Court of Nebraska determined in *In re Erick M.* that “one or both parents” required an immigrant child, who was abandoned by his father in Mexico but lived with his mother, to establish that reunification was also not possible with his mother prior to granting his SIJS special findings order.<sup>64</sup> In order to reach that result, the court first found that the Amendment’s language was ambiguous and then counterintuitively reasoned that while “the effect of the 2008 amendment was to expand the pool of children eligible for SIJS . . . juveniles must still be seeking relief from parental abuse, abandonment, or neglect” because the narrowness introduced by

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<sup>59</sup> *In re Menjivar*, Case No. A70117167, 29 Immig. Reptr. B2-37, at 170 (A.A.U. Tex., Dec. 27, 1994).

<sup>60</sup> *Id.* (internal quotation marks omitted).

<sup>61</sup> ANGIE JUNCCK ET AL., SPECIAL IMMIGRANT JUVENILE STATUS 4-10 (3rd ed. 2010).

<sup>62</sup> *Leslie H. v. Superior Court*, 168 Cal. Rptr. 3d 729, 736 (4th Dist. Cal. 2014); *In re Welfare of D.A.M.*, No. A12-0427, 2012 WL 6097225, at \*4 (Minn. Ct. App. Dec. 10, 2012); *Marcelina M-G. v. Israel S.*, 973 N.Y.S.2d 714, 723 (App. Div. 2013); *see also In re Miguel C.-N.*, 989 N.Y.S.2d 126, 127 (App. Div. 2014); *In re Jorge A.V.G.*, 987 N.Y.S.2d 909 (App. Div. 2014); *Sanchez v. Bonilla*, 982 N.Y.S. 2d 373 (App. Div. 2014); *Cecilia M.P.S. v. Santos H.B.*, 983 N.Y.S.2d 840 (App. Div. 2014); *Diaz v. Munoz*, 989 N.Y.S.2d 52, 54 (App. Div. 2014); *P.E.A. v. A.G.G.*, 975 N.Y.S.2d 85, 86 (App. Div. 2013).

<sup>63</sup> *See infra* note 65.

<sup>64</sup> *In re Erick M.*, 820 N.W.2d 639, 641, 648 (Neb. 2012). In that case, the immigrant child lived with his mother, and there were no allegations of abuse in that relationship.

the 1997 Amendments illustrated that the prevailing purpose of the legislation as a whole was to restrict eligibility.<sup>65</sup>

Some courts follow the suspicious reasoning of *Erick M.*<sup>66</sup> For example, the New Jersey Superior Court recently reconsidered its prior broad interpretation of the “one or both parents” language in a decision denying a special findings order.<sup>67</sup> The court explained that although there is no specific legislative history as to the meaning of “one or both parents,” “some guidance can be gained from the legislative history of the 2008 legislation as a whole.”<sup>68</sup> The court then reviewed the history of the 2008 Amendments, concluding that only a narrow interpretation was consistent with the legislation’s purpose:

[T]he legislative and administrative history of Subparagraph J shows two competing goals. Congress wanted to permit use of the SIJS procedure when necessary to prevent the return of juveniles to unsafe parents. Where such protection is unnecessary, however, Congress wanted to prevent misuse of the SIJS statute for immigration advantage . . . . The contrary interpretation does not achieve both of Congress’s goals. It would mean that a juvenile could apply for SIJS status, with its immigration advantages, even if that juvenile could be viably reunified with one parent who never abused, neglected, or abandoned the juvenile. Indeed, it would permit SIJS status even if that safe parent had raised the juvenile from birth, in love, comfort, and security, and even if reunification with the safe parent would not result in any further contact with the unsafe parent. Nothing in the legislative history of Subparagraph J supports such a broad interpretation.<sup>69</sup>

Even under the former New Jersey precedent that broadly interpreted the statutory language, the court was hesitant to recognize a rule that a child in a stable home environment with one parent might be eligible for SIJS:<sup>70</sup>

Under normal circumstances, the court would be reluctant to take jurisdiction in a case where, as here, the children are in a safe

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<sup>65</sup> Meghan Johnson & Kele Stewart, *Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases*, AMERICAN BAR ASSOCIATION (July 14, 2014), available at <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent-cases.html>.

<sup>66</sup> See *M.P.C. v. A.B.C.*, No. FD-13-20-10, 2012 WL 1205805 (N.J. Super. Ct. App. Div. Apr. 12, 2012) (affirming a denial of dependency for special immigrant juvenile status because 8 U.S.C.A. § 1101(a)(27)(J) did not allow SIJS for a child living with a non-neglectful parent in the United States); see also *D.C. v. A.B.C.*, 8 A.3d 260, 266 (N.J. Super. Ct. Ch. Div. 2010).

<sup>67</sup> *H.S.P. v. J.K.*, 87 A.3d 255, 268 (N.J. Super. Ct. App. Div. 2014).

<sup>68</sup> *Id.* at 267.

<sup>69</sup> *Id.* at 268.

<sup>70</sup> *In re Minor Children of J.E. and J.C.*, 74 A.3d 1013, 1019 (N.J. Super. Ct. Ch. Div. 2013).

placement with one of their natural parents. This case is different. The children were placed with petitioner by immigration authorities and that placement triggers the need for the court's supervision of that placement to make certain that the children are safe and well taken care of.<sup>71</sup>

The result of the confusion and conscious disregard for the clear statutory language is that some children are arbitrarily denied special findings orders even though Congress clearly intended to expand SIJS's scope.<sup>72</sup>

### B. *Dependency*

The elimination of the "long-term foster care" requirement explicitly broadened eligibility for SIJS relief beyond the child welfare system. As a substitute, a child "placed under the custody of . . . an individual or entity appointed by a State or juvenile court" was to be deemed dependent.<sup>73</sup> As the statute currently reads, in order to pursue a SIJS special findings order a child must establish that she is dependent upon the juvenile court in one of three ways:<sup>74</sup> 1) she has been committed to a state agency or department, 2) she is *dependent*<sup>75</sup> upon the juvenile court because of a particular proceeding, or 3) she has been committed to an individual entity by a state juvenile court.<sup>76</sup> The first option is a vestige of the initial intent of SIJS to include foster care children. The second option pre-existed the 2008 Amendments but only recognizes dependency on a juvenile court because of a proceeding that relates to the

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<sup>71</sup> *Id.* The facts of the boys' case were particularly compelling. Their mother fled to the United States from Honduras and was granted temporary protected status after the father of the children shot at her three times. The boys remained with the father in Honduras for 10 years and were abused by their stepmother and father, who was eventually killed as a result of his involvement in drug trafficking. The boys were abandoned and fled to the United States out of fear that witnessing their father's death would jeopardize their safety. Once in the United States, they surrendered to immigration authorities and were released as undocumented minors to their mother's care after two months in a juvenile detention facility. *Id.* at 1014-16. This decision was the law of New Jersey prior to the decision this summer that changed the course of New Jersey juvenile jurisprudence.

<sup>72</sup> Johnson & Yavar, *supra* note 15, at 88-89.

<sup>73</sup> Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2012).

<sup>74</sup> The additional amendment allowing for guardianship proceedings expanded eligibility to non-foster care children but did not go far enough because the dependency prong still continues to hinder some eligible children.

<sup>75</sup> I have italicized this first use of "dependency" to highlight the distinction between this dependency which refers to "dependency on a juvenile court" from the Dependency prong which encompasses each of the three options for establishing dependency. 8 U.S.C. § 1101(a)(27)(J).

<sup>76</sup> *Id.*

“care and custody” of the child.<sup>77</sup> The third option was the 2008 substitution that recognized guardianship proceedings as fulfilling the dependency requirement. The remainder of this sub-section explores the two dependency options most utilized by the post-2008 non-foster care SIJS beneficiaries: the guardianship option and the dependency option.

### 1. Guardianship

In many ways, the addition of guardianship merely drew attention to the pre-existing use of guardianship as bona fide dependency under the SIJS statute.<sup>78</sup> Prior to the 2008 Amendments, some state courts already granted special findings orders based on guardianship proceedings,<sup>79</sup> and the 1994 Administrative Appeals Office *In re Menjivar* decision recognized guardianship as an authorized action establishing court dependency for a SIJS special findings order.<sup>80</sup> The Appeals Office found:

[t]he acceptance of jurisdiction over the custody of a child by a juvenile court, when the child’s parents have effectively relinquished control of the child, makes the child dependent upon the juvenile court, whether the child is placed by the court in foster care or, as here, in a guardianship situation.<sup>81</sup>

After *Menjivar*, some state courts recognized that a guardianship petition sufficiently established the necessary dependency to grant a child a special findings order.<sup>82</sup> Prior to the TVPRA, the New York Supreme Court First Appellate Division recognized that a finding in favor of guardianship fulfilled the necessary dependency to grant a SIJS special

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<sup>77</sup> Federal regulations define a juvenile court as a court that handles proceedings related to a child’s “care and custody.” 8 C.F.R. § 204.11(a) (2009).

<sup>78</sup> See generally *In re Menjivar*, Case No. A70117167, 29 Immig. Rptr. B2-37 (A.A.U. Tex., Dec. 27, 1994).

<sup>79</sup> *Id.*; *In re Antowa McD.*, 856 N.Y.S.2d 576 (App. Div. 2008). Some may argue that guardianship was not accepted as a grounds for dependency prior to 2008 in New York. See *In re Guardianship of Vanessa D.*, 15 Misc. 3d 819 (N.Y. Fam. Ct. 2007); *In re Zaim R.*, 13 Misc. 3d 180 (N.Y. Fam. Ct. 2006). In each case the special findings motions were dismissed on jurisdiction grounds because the petitioner aged out, but included no discussion that the guardianship was an improper basis upon which to grant special findings. In addition, New York later recognized guardianship proceedings as sufficient to establish the necessary dependency to grant a special findings order. *In re Antowa McD.*, 856 N.Y.S.2d at 576.

<sup>80</sup> *In re Menjivar*, 29 Immig. Rptr. B2-37, at B2-39.

<sup>81</sup> *Id.*

<sup>82</sup> *In re Alamgir A.* 917 N.Y.S.2d 309 (App. Div. 2011); *Trudy-Ann W. v. Joan W.* 901 N.Y.S.2d 296, 299 (App. Div. 2010); Liebmann, *supra* note 31, at 518 n.56.

findings order.<sup>83</sup> The explicit codification of the administrative *Menjivar* rule was indicative of Congress's intent to expand relief beyond foster care children. For the first time, the SIJS statute explicitly recognized an affirmative path to relief whereby a child could petition a state court to commence guardianship proceedings. This marked a significant change from SIJS's origins, which only allowed a child to seek a special findings order after she had become completely dependent upon the state as a ward.<sup>84</sup> Specifically, states recognized that the expansion was justified under the original intent of SIJS because child welfare agencies were generally reluctant to file cases against parents outside of the United States<sup>85</sup> due to difficulties gathering data and investigating.<sup>86</sup> Thus, the codification of guardianship as a dependency option made sense as a means for a vulnerable child to affirmatively petition the court when the state was hesitant to initiate protection proceedings.<sup>87</sup> The Amendment was not such a far stretch from the original intent of the legislation, but in fact drastically expanded access to a special findings order.<sup>88</sup>

## 2. Dependency on a Juvenile Court

While the guardianship expansion recognized and affirmed the need for a broader awareness of how children might come before the court, the dependency option was left untouched. This dependency is not established by all juvenile court proceedings, but only includes proceedings that are narrowly considered to relate to the "care and custody" of the child.<sup>89</sup>

In spirit with the 2008 Amendments, which recognized that potential SIJS beneficiaries might come before the court in ways other than as a state ward, immigration advocates in New York City attempted to litigate an expansion of the

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<sup>83</sup> *In re Antowa McD.*, 856 N.Y.S.2d at 576.

<sup>84</sup> See *supra* Part I.

<sup>85</sup> The problem was not likely jurisdictional since the New York Family Court Act Section 1015 explicitly grants the family court jurisdiction over any case where a child resides in the county where the court sits, regardless of where the maltreatment may have occurred. N.Y. FAM. CT. ACT § 1015 (a) (McKinney 1998); Liebmann, *supra* note 31, at 518 n 56.

<sup>86</sup> Liebmann, *supra* note 31, at 518.

<sup>87</sup> *Id.*

<sup>88</sup> Johnson & Yavar, *supra* note 15, at 64-65; see *infra* Table 1.

<sup>89</sup> Federal regulations define a juvenile court as a court that handles proceedings related to a child's "care and custody." 8 C.F.R. § 204.11(a) (2009).

meaning of the narrow interpretation of dependency.<sup>90</sup> New York City advocates who argued that dependency should be interpreted more broadly relied heavily upon a memo issued by the Chief Administrative Judge of New York's Unified Court System, Judge Ann Pfau,<sup>91</sup> noting:

Juveniles may be eligible to apply to federal immigration authorities for SIJS where, *in any category* of court proceeding, a State court has determined that they are abused, neglected or abandoned, that "family reunification is not an option"<sup>[92]</sup> and that it would be contrary to their best interests to return to their home country.<sup>93</sup>

Specifically, advocates argued that a child before the juvenile court because of a child support order or a civil order of protection should fulfill the "dependent on a juvenile court" option and receive a special findings order.<sup>94</sup>

In *In re Hei Ting C.*, the Second Department declined to recognize dependency where a child found himself under the jurisdiction of a family court to enforce a child support order.<sup>95</sup> The court's opinion specifically declined to expand dependency because "no appellate decisions in this State have addressed the question of whether an order issued by the Family Court that does not award or affect the custody of a child satisfies the dependency prong."<sup>96</sup> Similarly, in Jane's case, the Kings County Family Court declined to issue a special findings order based upon the order of protection issued on behalf of a juvenile against her father.<sup>97</sup> Judge Gruebel's order specifically noted that because:

the children still live[d] with their mother, there has been no finding of abuse or neglect against the father in an Article 10 proceeding, and the court in this case has not accepted jurisdiction over the

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<sup>90</sup> *In re Hei Ting C.*, 969 N.Y.S.2d 150, 151 (N.Y. App. Div. 2013); Family Court Decision, *supra* note 20.

<sup>91</sup> Interview with Lauren Burke, Clinical Professor at Brooklyn Law School and counsel in *In re Hei Ting C.*, 969 N.Y.S.2d 150 (App. Div. 2013) (Nov. 29, 2013) (notes on file with author).

<sup>92</sup> This is the definition of "eligible for long-term foster care" in the federal regulations, a broader definition than foster care under New York law. "Long-term foster care" under the regulations means care until the child reaches the age of majority and specifically includes adoption and guardianship. Memorandum from Hon. Ann Pfau, Chief Admin. Judge of N.Y. Unified Court Sys., to Judges of the Family Court 2 n.2 (Oct. 8, 2008) (on file with author) (citation omitted).

<sup>93</sup> *Id.* (emphasis added).

<sup>94</sup> *In re Hei Ting C.*, 969 N.Y.S.2d at 151; Family Court Decision, *supra* note 20.

<sup>95</sup> *In re Hei Ting C.*, 969 N.Y.S.2d at 151.

<sup>96</sup> *Id.*

<sup>97</sup> Family Court Decision, *supra* note 20.



custody of the children . . . the requisites required [by] special immigrant juvenile status are not met.<sup>98</sup>

Thus, family courts in one of the most immigrant friendly states, New York,<sup>99</sup> continued to require a juvenile court action that is related to the “care and custody” of the child,<sup>100</sup> excluding support orders and only recently recognizing certain orders of protection as a basis to request a SIJS special findings order.<sup>101</sup>

The narrowness of the dependency option presents little or no difficulty for foster care children seeking SIJS relief because they have already been committed to a state agency and therefore fulfill the dependency prong.<sup>102</sup> In contrast, a non-foster care child similar to Jane or Susy might not be exposed to a state child welfare system and might have a difficult time establishing dependency.<sup>103</sup>

[D]espite an ongoing obligation to protect and support vulnerable children, especially those who have been harmed by abuse and neglect, it cannot be assumed that a local child protection agency will come to the aid [of children], calling into question one of the underlying premises of the federal statute and regulations establishing the SIJS criteria. At times . . . a youth simply does not come to the attention of the child protection agency. At other times, because a youth already has the support of an adult caregiver, often a relative, the child protection agency will determine that the youth is safe, no longer at risk of harm, and thus does not need the agency’s assistance.<sup>104</sup>

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<sup>98</sup> *Id.* at 4.

<sup>99</sup> See generally Jacqueline Bhabha & Susan Schmidt, *From Kafka to Wilberforce: Is the U.S. Government’s Approach to Child Migrants Improving?*, IMMIGR. BRIEFINGS, Feb. 2011, at tbl. 11 (ranking New York fourth among states granting SIJS petitions); see also U.S. DEPT OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2013 tbl. 4 (2013), available at <http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents> (click “Table 4”); Ghita Schwarz, *Why New York Is Still the Capital of Immigrant America*, THE NATION, (Jan. 6, 2015) <http://www.thenation.com/article/173957/why-new-york-still-capital-immigrant-america>.

<sup>100</sup> 8 C.F.R. § 204.11(a) (2014).

<sup>101</sup> See *Fifo v. Fifo*, No. O-9277-12, 2015 WL 1447564, \*2 (N.Y. App. Div. Apr. 1, 2015) (finding that “under the proper circumstances, a child involved in a family offense proceeding involving allegations of abuse or neglect may properly be the subject of such a determination as an intended beneficiary of the SIJS provisions”).

<sup>102</sup> Telephone Interview with David B. Thronson, former immigration practitioner at The Door’s Legal Servs. Ctr. (Nov. 6, 2013); Email from David B. Thronson, former immigration practitioner at The Door’s Legal Servs. Ctr., to author (Nov. 1, 2013) (on file with author).

<sup>103</sup> Mandelbaum & Steglich, *supra* note 9, at 610.

<sup>104</sup> *Id.*

Susy was lucky enough to have a guardian who could petition on her behalf, but Jane did not have that option and was left with only the option to fulfill the more demanding dependency prong.<sup>105</sup>

The 2008 expansion of SIJS eligibility created a new dynamic. SIJS had been a solution to a pre-existing state child welfare matter, rather than an immigration remedy.<sup>106</sup> As explained by Wendy Young, president of Kids in Need of Defense and an immigration adviser to Senator Edward M. Kennedy at the time of the TVPRA's passage, "[t]here was a recognition that these kids are incredibly vulnerable . . . ."<sup>107</sup> Children who were not in foster care and who had been ineligible for SIJS prior to 2008 now had new immigration opportunities. Immigration advocates recognized that they could initiate proceedings in family court in order to pursue SIJS special findings for non-foster care children.<sup>108</sup>

Prior to the TVPRA, most SIJS applicants initially came "to the attention of state child welfare authorities rather than federal immigration authorities."<sup>109</sup> A review of the current number of foster care children compared to non-foster care children that benefit from SIJS relief since 2008 illustrates that foster care children are not the primary beneficiaries of SIJS relief.<sup>110</sup> In New York City, between January 2011 and May 2013, only 340 children under the custody of Administration for Children Services (ACS)<sup>111</sup> or in foster care were identified as

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<sup>105</sup> Arguably, Jane's mother could have petitioned for guardianship on her behalf and perhaps made Jane eligible for SIJS relief in that way. However, her mother's autonomy to pursue the civil remedies she believes most effective for her family should be preserved. The civil order of protection was a less invasive form of civil relief and Jane should not be punished because her mother sought help in that way as opposed to seeking to terminate her father's parental rights.

<sup>106</sup> The history of the enactment of SIJS described *infra* note 33 and accompanying text also clearly illustrate that the driving force behind SIJS was the need to clean up a state welfare problem rather than an immigration problem.

<sup>107</sup> Hulse, *supra* note 42. Wendy Young's statement refers to more than SIJS eligible children since the TVPRA provided increased protection for children in immigration proceedings generally, even beyond those eligible for SIJS.

<sup>108</sup> *In re T.J.*, 59 So. 3d 1187 (Fla. Dist. Ct. App. 2011) (finding a *prima facie* case of dependency for a child living with her aunt, even though the child did not request services from the Department of Children Families or the State because the child was dependent as a matter of law, in that she was not being cared for by a guardian or parent).

<sup>109</sup> Susan Schmidt & Jacqueline Bhabha, *Kafka's Kids: Children in U.S. Immigration Proceedings Part II: Beyond and Besides Asylum*, IMMIGR. BRIEFINGS, Feb. 2007, at 35.

<sup>110</sup> Only a regional data comparison is possible because of the poor data collection and availability in this area at both the state and federal level.

<sup>111</sup> Administration for Children Services is the New York City agency providing protection for abused and neglected children. *About ACS*, NYC ADMIN. FOR

eligible for SIJS.<sup>112</sup> Of those eligible, 231 (67.9%) were referred to legal services for further review of their eligibility.<sup>113</sup> Only 99 children (29%) were granted SIJS status at the time of the report in June 2013.<sup>114</sup> Some of those referred for further review pursued different immigration relief or were later determined to already hold United States citizenship or LPR status.<sup>115</sup> No official data has been published as to the total number of SIJS beneficiaries from the State of New York during that time period, but for the two years prior to that time period (2009-2010), a reported total of 370 petitions were granted.<sup>116</sup> As a rough estimate, comparing the number of SIJS beneficiaries from New York State between 2009 and 2010 to the number of New York State foster care children reported to have benefited from SIJS relief, between January 2011 and March 2013, approximately 27% of SIJS petitioners were foster-care children.<sup>117</sup> Despite the clear shift in intended beneficiaries, many vulnerable non-foster care children continue to fall through the cracks of SIJS relief.

### 3. Expanded SIJS Relief Does Not Include Consideration of Domestic Violence

The spirit of the 2008 Amendments—to provide more comprehensive relief to vulnerable children—falls short of its goal because special findings orders are granted on arbitrary grounds that are not indicative of a child's vulnerability. The problem lies in the decision by Congress to condition special findings orders on the type of proceeding in which the child approaches the state juvenile court. The problem is both one of

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CHILD. SERVICES, <http://www.nyc.gov/html/acs/html/about/about.shtml> (last visited May 1, 2015).

<sup>112</sup> N.Y.C. ADMIN. FOR CHILDREN'S SERVS., LOCAL LAW 6 OF 2010: ANNUAL REPORT 7-9 (June 2013).

<sup>113</sup> *Id.*

<sup>114</sup> Several of those identified submitted SIJS petitions and awaited their interview, or were preparing a SIJS petition. Others had legal status or pursued relief more favorable to their particular case. *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Jacqueline Bhabha & Susan Schmidt, *From Kafka to Wilberforce: Is the U.S. Government's Approach to Child Migrants Improving?*, IMMIGR. BRIEFINGS, Feb. 2001, app. 1, tbl 2.

<sup>117</sup> This number is obviously flawed because it compares data for foster-care beneficiaries from a different time period than total New York State beneficiaries. In addition, it only includes New York City foster care children while the total number of New York beneficiaries likely includes non-NYC foster care children who might have received SIJS status. Given the lack of data in this area, this comparison, flawed as it may be, is likely the most useful to illustrate the low percentage of foster care SIJS beneficiaries compared to non-foster care beneficiaries.

misinterpretation of federal legislation by state courts as seen by the “one or both parents” interpretation, and poor legislative and regulatory drafting at the federal level as seen with the rigid narrowness of dependency. Children living in homes plagued by domestic violence are particularly affected by the arbitrary requirements that juvenile courts use to determine whether to grant special findings.

A child who lives in a home where there is domestic violence is likely to have one functioning parent and is only subject to risk because of the actions of the second parent. The Nebraska Supreme Court’s interpretation of the “one or both parents” language, therefore, can be particularly difficult for children in a home where there is domestic violence.<sup>118</sup> Likewise, the dependency barrier is particularly onerous for children in a home where there is domestic violence because it discounts orders of protection, the very proceeding by which these children are likely to petition the court to fulfill the dependency requirement.

The “one or both parents” prong has been narrowly interpreted to restrict eligibility because courts appear hesitant to recognize that a child in a stable home environment might be eligible for SIJS; whereas, the dependency prong clearly restricts those eligible to a certain type of state court dependency. Courts will likely begin to accept the intended interpretation of the “one or both parents” language because New York and California, influential states when it comes to matters of immigration, have adopted the intended expansive interpretation.<sup>119</sup> In addition, once the approved USCIS regulations are put in place to clarify that the addition of the “one or both parents” language was intended to “expand eligibility,” more uniform state application should follow.<sup>120</sup> Not all advocates believe the “one or both parents” clarification is enough to ensure consistent interpretation across state lines.<sup>121</sup> In fact, some advocates support increased regulatory guidance regarding the “one or both parents” language because, “without

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<sup>118</sup> *In re Erick M.*, 820 N.W.2d 639 (Neb. 2012).

<sup>119</sup> *Marcelina M-G. v. Israel S.*, 973 N.Y.S.2d 714 (App. Div. 2013); *see also* *Leslie H. v. Superior Court*, 168 Cal. Rptr. 3d 729 (4th Dist. Cal. 2014); *In re Miguel C.N.*, 989 N.Y.S.2d 126 (App. Div. 2014); *In re Jorge A.V.G.*, 987 N.Y.S.2d 909 (App. Div. 2014); *Sanchez v. Bonilla*, 982 N.Y.S.2d 373 (App. Div. 2014); *Cecilia M.P.S. v. Santos H.*, 983 N.Y.S. 2d 840 (App. Div. 2014); *Diaz v. Munoz*, 989 N.Y.S.2d 52 (App. Div. 2014); *P.E.A. v. A.G.G.*, 975 N.Y.S.2d 85, 85 (App. Div. 2013).

<sup>120</sup> *See* Specialized Immigrant Juvenile Petitions, 76 Fed. Reg. 54978, 54979 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. pts. 204, 205-45).

<sup>121</sup> *Johnson & Stewart*, *supra* note 65.

an explicit recognition of the validity of one-parent SIJS cases, there is the risk that even more state court judges will close the door to eligible children before their petitions can be considered by USCIS.”<sup>122</sup> While their concern is valid, the “one or both parents” problem—one of incorrect state interpretation of fairly clear federal legislation—is less concerning than the dependency problem, which stems from poor federal legislation.

The proceeding by which a child enters the state court is not necessarily indicative of his or her level of vulnerability, and it is certainly not within the state juvenile court judge’s jurisdiction to refuse relief based on concerns for immigration fraud.<sup>123</sup> A child like Jane may appear drastically different from a foster care child or a child seeking SIJS as a result of an approved guardianship petition with a non-biological parent, but in many ways there are few legal distinctions. Consider Jane and Susy: they have each been abused, neglected, or abandoned by a biological parent and need to re-adjust their legal rights with that parent.<sup>124</sup> The limited SIJS relief available to non-foster care children arbitrarily ignores that a child who has secured a final order of protection against a parent is dependent upon the court for her safety.<sup>125</sup> Instead, Susy was granted relief because she established dependency on the court, while Jane’s dependency was not recognized.<sup>126</sup> The inconsistency is glaring and quite concerning from a child welfare perspective. There needs to be an expansion of

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<sup>122</sup> *Id.*

<sup>123</sup> For instance, Jane sorely needed the court’s protection, as indicated by the multiple orders of protection granted on her behalf to keep her safe from her abusive father, while Susy was in no immediate danger. Nonetheless, some state court judges have refused to make findings of dependency on the grounds that a juvenile only seeks the order for immigration purposes. Adelson, *supra* note 5, at 81. For example, in *In re Mohamed B.*, the family court judge denied SIJS findings because he had suspicions as to how the child separated from his hosts while visiting the United States. *In re Mohamed B.*, 921 N.Y.S.2d 145 (App. Div. 2011) (reversing the New York State Second Appellate Department). The most drastic example is *In re Jason K.* where a student was denied SIJS relief because he was still lawfully present on a student visa, and the judge noted that SIJS is exclusively intended for “[a]n unaccompanied child [who] is subject to deportation unless granted permission to stay in the United States.” *In re Jason K.* 972 N.Y.S.2d 481 (Fam. Ct. 2013) (citation omitted) (internal quotation marks omitted). Similar suspicion resulted in a denial of special findings because a child arranged his own transport to the United States and thereby exhibited too much agency to be determined dependent. *Nirmal S. v. Rajinder K.*, 956 N.Y.S.2d 545 (App. Div. 2012). The unfortunate result of this suspicion is that some very vulnerable children are denied relief.

<sup>124</sup> See *supra* INTRODUCTION.

<sup>125</sup> Allie Meiers, *Civil Orders of Protection: A Tool to Keep Children Safe*, 19 J. AM. ACAD. MATRIM. L. 373, 377 (2005).

<sup>126</sup> See *supra* INTRODUCTION.

dependency to include children who are in homes where there is domestic violence.

Further complicating any efforts for reform, there is a lack of demographic data about the children who seek SIJS relief. There is no comprehensive, detailed reporting of the individual characteristics of those children seeking relief either at the state or federal level.<sup>127</sup> New York State Family Courts do not collect records or information about the type of proceedings in which children petition juvenile courts for special findings orders.<sup>128</sup> The lack of reliable data is problematic for meaningful reform efforts; it allows state judges to continually stereotype applicants and provides little guidance for how regulations should change to better accommodate the population seeking SIJS relief. The remainder of the note focuses on solving the dependency problem, since less attention and fewer reform efforts have focused on eliminating the dependency inconsistency.

### III. PROMULGATING A FEDERAL REGULATION

#### A. *Proposal*

The most principled solution to the dependency problem must include a federal solution, since at its root this is a federally created problem. Just as the approved, but still pending, September 2011 regulations<sup>129</sup> attempt to clarify that the “one or both parent” legislation was intended to “expand eligibility,” USCIS should promulgate a regulation, or at least distribute a regulatory guidance memorandum as to the meaning of dependency, to help ensure that state courts grant special findings orders to children like Jane. Specifically, USCIS should pass a regulation explicitly providing that a permanent one year civil order of protection issued by a juvenile court is dispositive evidence that a child is dependent upon the juvenile court for his or her “care and custody.”<sup>130</sup>

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<sup>127</sup> Email from Rosemary Hartmann, Adjudications Officer for the USCIS Office of Policy & Strategy, to author (Nov. 20, 2013) (on file with author); Email from Michael McLoughlin, First Deputy Chief Clerk for N.Y.C. Family Court, to author (Oct. 18, 2013) (on file with author). The author made several unsuccessful attempts to receive data from USCIS regarding the demographics of SIJS beneficiaries as well as unsuccessful attempts to receive data from New York City Family Courts issuing special findings.

<sup>128</sup> Email from Michael McLoughlin, to author, *supra* note 127.

<sup>129</sup> See Specialized Immigrant Juvenile Petitions, 76 Fed. Reg. at 54979.

<sup>130</sup> There is support for this position in the very recent Second Appellate Department decision finding that “under the proper circumstances, a child involved in

A civil order of protection is a court action intended to address domestic violence safety concerns.<sup>131</sup> It is widely recognized that “[c]ivil protection orders are one of the most commonly sought legal remedies available to protect domestic violence victims.”<sup>132</sup> Some form of this relief is available in all 50 states and the District of Columbia.<sup>133</sup> A permanent order of protection<sup>134</sup> cannot be granted without a hearing in which the accused party appears and has “an opportunity to be heard and present evidence.”<sup>135</sup> The duration of a permanent civil order of protection varies from state to state, but in the majority of states, a final order of protection is effective for one to two years.<sup>136</sup> Eligibility to file for a civil order of protection is limited to a victim who can show beyond “a preponderance of the evidence”<sup>137</sup> that she has been subject to certain types of threats or abuse and she has at least one of the enumerated intimate relationships to the perpetrator.<sup>138</sup> The conduct that is generally required to merit an order of protection for a child includes “overt acts of physical harm, threats of imminent harm, harassment, sexual acts with minors, lewd fondling and touching of a minor,” as well as “emotional abuse.”<sup>139</sup> Most states include the parent-child relationship as one of those eligible for a civil order of protection.<sup>140</sup> In some states, an order of protection petition can be commenced in a state juvenile

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a family offense proceeding involving allegations of abuse or neglect may properly be the subject of such a determination as an intended beneficiary of the SIJS provisions.” *Fifo v. Fifo*, No. O-9277-12, 2015 WL 1447564, \*2 (N.Y. App. Div. Apr. 1, 2015).

<sup>131</sup> Lisa Vollendorf Martin, *What's Love Got To Do With It: Securing Access to Justice For Teens*, 61 CATH. U. L. REV. 457, 466 (2012). “Additionally, civil orders of protection (CPO) may be called many different things depending on the jurisdiction. Some states call their civil orders of protection a Permanent Protective Order (PPO), a Permanent Restraining Order (PRO) or some may simply refer to the order as a domestic violence injunction.” Meiers, *supra* note 125, at 375-76.

<sup>132</sup> NAT’L CTR. ON DOMESTIC & SEXUAL VIOLENCE, THE PRACTITIONER’S GUIDE TO LITIGATING FAMILY OFFENSE PROCEEDINGS 1, available at <http://www.ncdsv.org/images/FINAL-ThePractitioner%27sGu.pdf> (last visited May 11, 2015).

<sup>133</sup> Martin, *supra* note 131, at 466.

<sup>134</sup> Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 101 (2005). The reader should distinguish a final order of protection from an *ex parte* order which can be granted with significantly fewer procedural protections for the accused and generally lasts for a much shorter period of time. *Id.*

<sup>135</sup> Meiers, *supra* note 125, at 379.

<sup>136</sup> Catherine F. Klein & Leslye E. Orloff, *Symposium on Domestic Violence: Article: Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 848, 905 (1993); Meiers, *supra* note 125, at 375-76.

<sup>137</sup> Smith, *supra* note 134, at 101.

<sup>138</sup> Klein & Orloff, *supra* note 136, at 848, 869.

<sup>139</sup> Meiers, *supra* note 125, at 377.

<sup>140</sup> Martin, *supra* note 131, at 469-71.

court on a child's behalf by a parent, the state or a welfare agency, or the child herself.<sup>141</sup>

Frivolous allegations do not merit a permanent order of protection.<sup>142</sup> A permanent order of protection is already considered "convincing" evidence of battery in other immigration contexts.<sup>143</sup> Expanding dependency to include proceedings in which permanent orders of protection are granted for at least one year ensures an avenue to SIJS relief for children in homes where there is domestic violence.

### B. *Benefits of a Narrow Regulatory Amendment*

Various proposals have been put forward to handle the SIJS dependency problem. Some advocate that states should amend their civil codes to "ensure a jurisdictional basis for freestanding SIJS predicate order motions in juvenile or family courts" or to provide a "self-petitioning 'state of want' cause of action" enabling children to "initiate a SIJS predicate order request outside of the context of a dependency action."<sup>144</sup> The problem with a state-by-state campaign is that it does nothing to promote uniform SIJS relief but rather contributes to inconsistent application across state lines. Furthermore, such an expansive broadening of state juvenile court jurisdiction to grant special findings orders seems inconsistent with the history of SIJS.

Others advocate for federal reform, including an expanded definition of dependency. SIJS advocates Randi Mandelbaum and Elissa Steglich propose clarifying or broadening dependency by "either chang[ing] the statutory language from 'declared dependent' to 'the state court having

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<sup>141</sup> "State protection-order statutes fall loosely into three groups with regard to standing for minor petitioners: (1) statutes that expressly grant standing to some or all minors; (2) statutes that expressly deny standing to some or all minors; and (3) statutes that are ambiguous or silent on the issue." *Id.* (citations omitted).

<sup>142</sup> Meiers, *supra* note 125, at 377.

<sup>143</sup> Liebmann, *supra* note 36, at 653 ("'Credible evidence of battery or extreme cruelty' can include the type of restraining orders and civil protection orders that are frequently sought and issued in family offense and child dependence proceedings in family court. In fact, such orders are generally considered among the most convincing types of evidentiary proof that can be offered, and noncitizens who obtain protection orders have established one of the most important elements of the VAWA self-petition. Such orders can serve as critical support for the noncitizen's claim of battery or extreme cruelty and can confirm the credibility of the self-petitioner.").

<sup>144</sup> Baum, *supra* note 38, at 623. These authors argue that states should be incentivized to make changes because once a child becomes eligible for SIJS the child is "federal[ly] eligibl[e] for health care, employment authorization, financial aid, and other benefits denied to unlawfully present immigrants." *Id.*



assumed jurisdiction,’ or [] defin[ing] ‘declared dependent’ in the federal regulations simply as ‘the state court having assumed jurisdiction.’”<sup>145</sup> Supporting this argument, they point to practitioners’ and state court judges’ common understanding that dependency simply means that a juvenile court has taken jurisdiction over a matter related to the child.<sup>146</sup> Mandelbaum and Steglich are most concerned with inconsistent state interpretations of dependency, rather than the exclusion of a particular vulnerable child population.<sup>147</sup> A broad expansion of dependency like that put forth by Mandelbaum and Steglich would likely encourage increased scrutiny by state court judges who already arguably exceed their jurisdiction by questioning a child’s motive for relief, rather than focusing on the domestic petition the child brings before the court.<sup>148</sup> Certainly, Mandelbaum’s and Steglich’s broad proposal includes child support orders as sufficient evidence of dependency.<sup>149</sup> My proposal does not go so far as to include children who appear before a juvenile court under a child support enforcement order.<sup>150</sup> Instead, the focus of this solution is on including a small, vulnerable group of immigrant children, which is both consistent with the purpose of SIJS to protect the most vulnerable children and more politically feasible than broad reform.

Adding orders of protection to the definition of dependency is consistent with the original purpose of SIJS—to protect vulnerable children.

[N]ot all violence or abuse directed towards children evokes the criminal or juvenile justice systems. When a parent or guardian petitions the court for a civil order of protection for [a] child, it might be the first contact the adult or child has had with the judicial system.

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<sup>145</sup> Mandelbaum & Steglich, *supra* note 9, at 616.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* This note does not focus on the variation between states as to the meaning of dependency or the type of proceedings that various states include within that meaning. It does not appear that any states currently consider a civil order of protection to fall within that definition.

<sup>148</sup> For state courts to engage in that type of review usurps the decision-making function of USCIS. State courts involve themselves in these issues that are best left to immigration authorities, who do in fact conduct that analysis on a regular basis. Johnson & Stewart, *supra* note 65.

<sup>149</sup> Note that I do not advocate expanding SIJS relief to include a case like *In re Hei Ting C.* where advocates tried to argue that a child support order should also be sufficient to qualify a child for the dependency prong. See *supra* note 90 and accompanying text.

<sup>150</sup> See *Fifo v. Fifo*, No.0-9277-12, 2015 WL 1447564, \*2 (N.Y. App. Div. Apr. 1, 2015), where the Second Appellate Department distinguished a proceeding involving an order of protection from the issue in *In re Hei Ting C.*, 969 N.Y.S.2d 150, 151 (App. Div. 2013), involving a child support order.

Civil orders of protection statutes were designed to encompass the minor children of domestic abuse victims.<sup>151</sup>

Furthermore, there is precedent for using regulatory guidance to expand the scope of SIJS relief. When SIJS was a relatively new form of relief and advocates of children in foster care became aware of its potential benefit, there was a large group of undocumented children in the foster care system on the verge of emancipation.<sup>152</sup> These children already had dependency orders from a juvenile court as part of their foster care placement.<sup>153</sup> To handle the volume of SIJS applicants, child welfare workers capitalized upon the statutory and regulatory language that supported an administrative agency's ability to determine the "best interest" of immigrant children in the SIJS context.<sup>154</sup> Both the INA Section 101(a)(27)(J)(i) and the federal regulations associated with SIJS relief allowed for "administrative or judicial proceedings" as the basis for determining that it is not in the child's "best interest" to return to their home country or to reunite with one or both parents.<sup>155</sup>

A child advocate involved in early SIJS adjudication in New York City explained the logic behind the hybrid procedure:

To avoid having to get back in court, we coupled the non-[SIJS] court finding placing the child in care with an affidavit from a high level child welfare official made the other factual findings based on a review of the file and our submissions. INA 101(a)(27)(J) requires a juvenile court for dependency, but contemplates "administrative or judicial proceedings" for the rest. Our assertion, which back then legacy INS accepted, was that the affidavit was the result of an administrative process sufficient to satisfy the statute.<sup>156</sup>

The regulatory guidance paved the way for broader interpretation of SIJS. In the same way, future regulation could pave the way for increased recognition of the serious vulnerability of immigrant children in homes where there is domestic violence. This note's proposed expansion, like the amendment to include guardianship as a ground for dependency, does nothing more than ensure that vulnerable youth who are indistinguishable from current SIJS beneficiaries, apart from

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<sup>151</sup> Meiers, *supra* note 125, at 384.

<sup>152</sup> Telephone Interview with David B. Thronson, *supra* note 102; *see* Email from David B. Thronson, to author, *supra* note 102.

<sup>153</sup> *Id.*

<sup>154</sup> Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(27)(J)(ii) (2012); 8 C.F.R. § 204.11 (c)(6) (2014).

<sup>155</sup> 8 U.S.C. § 1101 (a)(27)(J)(ii).

<sup>156</sup> Telephone Interview with David B. Thronson, *supra* note 102; Email from David B. Thronson, to author, *supra* note 102.

the proceeding by which they approach the state juvenile court, are afforded the same relief.<sup>157</sup>

### C. *Politically Feasible*

In addition, regulatory rulemaking is also a practical, politically feasible solution, which is crucially important in our current political atmosphere. In fact, the TVPRA has recently come under attack:

The Obama administration says the [TVPRA] is partly responsible for tying its hands in dealing with the current influx of children . . . . What many can agree on is that the Wilberforce law was not enacted with the idea of dealing with the current flow of tens of thousands of unaccompanied minors or providing an incentive for children to reach the border. “It is classic unintended consequences,” said Marc R. Rosenblum, deputy director of the U.S. Immigration Policy Program at the Migration Policy Institute. “This was certainly not what was envisioned.”<sup>158</sup>

The Obama administration’s comments are not specifically directed toward the SIJS Amendments included in the TVPRA, but nonetheless show a mounting concern that immigration relief extended to vulnerable children is too generous. “[G]iven the hostile climate toward immigration-related legislation in Congress, regulatory action may be more expedient and appropriate.”<sup>159</sup> A regulatory change would not need to pass through Congress, and to the extent that Congress disagrees with the change, the Congressional Regulatory Review Act provides them with the power to reject the rule within 60 days of its enactment.<sup>160</sup> Of course, any amendment of the dependency prong might face especially stringent criticism because Congressional and federal authorities welcome the dependency requirement as a safeguard against fraud, allegedly legitimizing SIJS proceedings.<sup>161</sup> The Second Appellate Department of New York’s Supreme Court, in denying special findings based upon a lack of sufficient dependency, specifically noted:

The requirement that a child be dependent upon the juvenile court . . . ensures that the process is not employed inappropriately by

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<sup>157</sup> See *infra* Part II.

<sup>158</sup> Hulse, *supra* note 42; see also Preston, *supra* note 3.

<sup>159</sup> Mandelbaum & Steglich, *supra* note 9, at 616 n.82.

<sup>160</sup> Robert Longley, *Federal Regulations*, ABOUT NEWS (Nov. 6, 2014), <http://usgovinfo.about.com/od/uscongress/a/fedregulations.htm>.

<sup>161</sup> *In re Hei Ting C.*, 969 N.Y.S.2d 150, 154-55 (App. Div. 2013).

children who have sufficient family support and stability to pursue permanent residency in the United States through other, albeit more protracted, procedures.<sup>162</sup>

Some juvenile court judges understand expanded SIJS relief as a slippery slope toward immigration fraud and scrutinize immigrant children seeking special findings orders:<sup>163</sup>

[T]he local officials are often wary of the implications of their actions and nervous about what they perceive as making decisions about whether a person will obtain an immigration benefit. Some may not want to participate in what they perceive as a process that condones or further encourages illegal immigration.<sup>164</sup>

A recent Queens Family Court decision granting SIJS relief warned in dicta that:

Current news reports indicate that parents have been encouraged to dispatch their young on perilous journeys to the United States in the company of paid smugglers who are part of organized criminal enterprises. The children arrive in the United States with the hope that they will be not be deported and that they will be granted sanctuary in the form of legal permission to remain permanently.

Although SIJS was enacted to protect children who have been abused, neglected, or abandoned, it may perversely expose those children to maltreatment. The smuggling of children across international borders is inimical to their safety and well-being.<sup>165</sup>

There is little doubt that any proposed expansion of dependency might encounter resistance.<sup>166</sup> However, like the

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<sup>162</sup> *Id.*

<sup>163</sup> Johnson & Yavar, *supra* note 15, at 76.

<sup>164</sup> *Id.*

<sup>165</sup> *In re Amandeep S.*, No. G-1310/14, 2014 WL 2808690, \*13 (N.Y. Fam. Ct. June 19, 2014).

<sup>166</sup> In fact, on March 4, 2015, a local NBC investigative team reported the uncovering of rampant SIJS fraud in the Sikh community in Queens, New York. Melissa Russo et al., *I-Team: Family Court Exploited in Immigration Cases in Queens, Insiders Charge*, NBCNEWYORK.COM (Mar. 4, 2015, 5:16 PM), <http://www.nbcnewyork.com/news/local/family-court-queens-immigration-cases-human-smuggling-green-card-295050931.html>. Their report noted that guardianship petitions in the Queens Family Court jumped 75% over the last year and that “hundreds of young men from the same part of India are all telling similar stories in order to get special access to green cards.” *Id.* Congressman Bob Goodlatte, Chair of the House Judiciary Committee picked up on the report and sent a letter to Department of Homeland Security Secretary Johnson specifically requesting answers to the following questions:

1) What immediate steps will you take to ensure that fraudulent SIJ petitions are not approved by U.S. Citizenship and Immigration Services (USCIS) adjudicators? 2) What long term changes will you make to the adjudications process and policies to ensure that fraudulent SIJ petitions are not approved by USCIS adjudicators? 3) How exactly will you coordinate with state courts to ensure that abuse, abandonment or neglect is not found by

2008 Amendments that codified guardianship proceedings as *per se* establishing dependency, the addition of orders of protection to a regulatory definition merely extends protection to those eligible for SIJS by authorizing a new posture by which children can approach the court. In addition, this proposal arguably expands eligibility to a much smaller group than the 2008 Amendments. At least one experienced state court judge, Judge Pfau of New York, recognizes that dependency must have a broader meaning than the narrow limitations currently imposed on the definition.<sup>167</sup>

Furthermore, the statute is not reaching enough vulnerable children, as evidenced by the small number of children actually obtaining SIJS relief. The 5,000 cap allotted to SIJS beneficiaries<sup>168</sup> has yet to be met in any year since the legislation's enactment.<sup>169</sup> There was considerable surprise and perhaps disappointment when, "rather than a flood anticipated by some SIJS detractors," the groundbreaking 2008 Amendments actually resulted in only "a trickle" of the expected increase.<sup>170</sup> For many years, only 500 SIJS beneficiaries adjusted to LPR status.<sup>171</sup> The number of beneficiaries slowly increased after the 2008 Amendments; however, even in 2013, at its peak, 2,735 reserved positions

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these courts when there is evidence of fraudulent claims? 4) What, if any, statutory changes do you suggest to give you additional tools to ensure that fraudulent SIJ petitions are not approved by USCIS adjudicators?

Letter from Congressman Bob Goodlatte, Chair of the House Judiciary Comm., to Jeh Johnson, Sec'y of Homeland Sec. (Mar. 19, 2015), *available at* [https://goodlatte.house.gov/system/uploads/415/original/RWG\\_to\\_Johnson\\_3.19.15.pdf](https://goodlatte.house.gov/system/uploads/415/original/RWG_to_Johnson_3.19.15.pdf). These developments appear to be the most recent and also direct attack on SIJS as a form of relief since 1997. Various immigration advocacy agencies have come together drafting a letter in response to Congressman Goodlatte explaining the value of SIJS and correcting some exaggerations and misunderstandings of how SIJS operates. Email from Ctr. on Immigration & Child Welfare, to author (Mar. 29, 2015) (on file with author).

<sup>167</sup>

Juveniles may be eligible to apply to federal immigration authorities for SIJS where, *in any category* of court proceeding, a State court has determined that they are abused, neglected or abandoned, that 'family reunification is not an option' and that it would be contrary to their best interests to return to their home country.

Memorandum from Hon. Ann Pfau, to Judges of the Family Court, *supra* note 92.

<sup>168</sup> Beth Morales Singh, *To Rescue, Not Return: An International Human Rights Approach To Protecting Child Economic Migrants Seeking Refuge in the United States*, 41 COLUM. J. L & SOC. PROB. 511, 526 (2008).

<sup>169</sup> See *infra* note 172.

<sup>170</sup> Jackson, *supra* note 15, at 22.

<sup>171</sup> Ooi, *supra* note 16, at 896.

remained unfilled.<sup>172</sup> In 2012, a total of 2,250 immigrant children obtained LPR status as a result of SIJS,<sup>173</sup> leaving 2,740 reserved positions empty. Even with increased eligibility, on average only one quarter of the 5,000 reserved SIJS LPR positions are filled.<sup>174</sup>

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<sup>172</sup> U.S. DEPT OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2013 tbl. 7 (2013), *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents> (click “Table 7”) [hereinafter PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2013 TABLE].

<sup>173</sup> U.S. DEPT OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2012 tbl. 7 *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2012-legal-permanent-residents> (click “Table 7”) [hereinafter PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2012 TABLE].

<sup>174</sup> Singh, *supra* note 165, at 526; Ooi, *supra* note 16, at 890, 896; Adelson, *supra* note 5, at 85.

TABLE 1: TOTAL SIJS BENEFICIARIES ADJUSTING STATUS 1997-2013<sup>175</sup>

Fiscal year	Total SIJS Beneficiaries
2013	2,735
2012	2,250
2011	1,609
2010	1,480

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<sup>175</sup> U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 36 (1997), *available at* <https://www.dhs.gov/xlibrary/assets/statistics/yearbook/1997YB.pdf>; U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 32 (1998), *available at* <https://www.dhs.gov/xlibrary/assets/statistics/yearbook/1998/1998yb.pdf>; U.S. DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 32 (1999), *available at* <https://www.dhs.gov/xlibrary/assets/statistics/yearbook/1999/FY99Yearbook.pdf>; U.S. DEP'T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 31 (2000), *available at* <https://www.dhs.gov/xlibrary/assets/statistics/yearbook/2000/Yearbook2000.pdf>; U.S. DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 29 (2001), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2001/yearbook2001.pdf>; U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2004 tbl. 5 (2002), *available at* <http://www.dhs.gov/fiscal-year-2002-yearbook-immigration-statistics-0> (click "Table 5"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2004 tbl. 5 (2004), *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2003-0> (click "Table 5"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2004 tbl. 4 (2004), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2004-0> (click "Table 4"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2005 tbl. 7 (2005), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2005-3> (click "Table 7"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2006 tbl. 7 (2006), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2006-3> (click "Table 7"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2007 tbl. 7 (2007), *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2007-3> (click "Table 7"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2008 tbl. 7 (2008), *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2008-3>; U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2009 tbl. 7 (2009), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2009-3> (click "Table 7"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2010 tbl. 7 (2010), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2010-3> (click "Table 7"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2011, tbl. 7 (2011), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2011-legal-permanent-residents> (click "Table 7"); PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2012 TABLE, *supra* note 173; PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2013 TABLE, *supra* note 172.

2009	1,144
2008	989
2007	772
2006	894
2005	660
2004	624
2003	445
2002	510
2001	541
2000	658
1999	345
1998	287
1997	430

A less-than-fifty percent fulfillment rate is curiously paltry when compared to the success of other immigration programs for vulnerable, undocumented immigrants; 2014 marked the fifth consecutive year where all 10,000 U-Visas<sup>176</sup> were utilized within the first several months of the fiscal year.<sup>177</sup>

No single, independent explanation has been offered for why SIJS continually remains an underutilized form of relief given the increasingly large number of vulnerable undocumented children in the United States.<sup>178</sup> Advocates suggest that a lack of awareness among child advocates and immigrant children is likely the largest contributor to the consistently low number of beneficiaries.<sup>179</sup> Regardless of the reason that SIJS relief has not reached its cap, Congress clearly left room for more children to qualify for SIJS relief. There is no principled logic to preclude children like Jane when they are clearly in need of protection and there is a continual deficit in SIJS beneficiaries.<sup>180</sup>

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<sup>176</sup> The U-Visa provides relief to victims of domestic violence and is further discussed later in this piece. See *infra* note 181 and accompanying text.

<sup>177</sup> The U-Visa was created in 2008 and predictably fulfills its 10,000 quota within the first several months of the fiscal year. Daniel M. Kowalski, *USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year*, LEXISNEXIS LEGAL NEWSROOM: IMMIGRATION LAW (Dec. 12, 2010 8:24 AM), [http://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2013/12/12/uscis-approves-10-000-u-visas-for-5th-straight-fiscal-year.aspx?utm\\_source=Migration+%26+Child+Welfare+National+Network+E-News&utm\\_campaign=58b32dae2c-MCWNN\\_E\\_News\\_061013&utm\\_medium=email&utm\\_term=0\\_4a8508bf17-58b32dae2c-90769025](http://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2013/12/12/uscis-approves-10-000-u-visas-for-5th-straight-fiscal-year.aspx?utm_source=Migration+%26+Child+Welfare+National+Network+E-News&utm_campaign=58b32dae2c-MCWNN_E_News_061013&utm_medium=email&utm_term=0_4a8508bf17-58b32dae2c-90769025).

<sup>178</sup> Jackson, *supra* note 15, at 22.

<sup>179</sup> Mandelbaum & Steglich, *supra* note 9, at 612.

<sup>180</sup> Since the recent surge of unaccompanied youth across the border in 2014, there will arguably be a much higher number of SIJS petitioners and as a result a



Others who object to expanding the definition of dependency may argue that the addition of a final order of protection is duplicative of other forms of comparable relief, in particular the U-Visa that was designed for victims of domestic violence and might afford protection to a child like Jane.<sup>181</sup> The U-Visa is a nonimmigrant visa<sup>182</sup> available to undocumented victims of certain enumerated crimes in the United States who cooperate with law enforcement in the prosecution of crimes committed against them, including crimes categorized as domestic violence.<sup>183</sup> An integral part of the U-Visa is the receipt of a certification that the victim has cooperated with law enforcement in the prosecution of the crime.<sup>184</sup> A variety of state-recognized officials have the authority to grant these certificates, including police commissioners, family court judges, head officials of state agencies, and other state officials.<sup>185</sup> U-Visa holders are eligible to adjust to LPR status after three years of U-Visa status.<sup>186</sup>

The U-Visa does not offer relief that obviates the need for additional federal regulatory guidance as to the meaning of SIJS dependency. Children are currently eligible for U-Visa status either as the primary beneficiaries or as derivatives of a

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much higher number of SIJS beneficiaries. Hulse, *supra* note 42; Preston, *supra* note 3. It remains to be seen whether SIJS will reach the 5,000 cap for 2014.

<sup>181</sup> Liebmann, *supra* note 36, at 652. Liebmann notes that SIJS, VAWA, and U visas are the most utilized forms of relief for immigrant survivors of family crisis. The Violence Against Women Act (VAWA) is not as applicable here because it requires that the abusing parent be either a United States citizen or a permanent resident in order for a child to seek relief under the statute. VAWA relief was enacted in 1994 and was the first immigration remedy provided explicitly for victims of domestic violence. A VAWA self-petitioner must satisfy seven requirements to establish eligibility: "(1) relationship to the abuser; (2) that the abuser is a U.S. citizen or lawful permanent resident; (3) that the petitioner resides in the United States (though there are exceptions to this); (4) that the petitioner does, or at one time did, reside with the abuser; (5) credible evidence of battery or extreme cruelty; (6) good moral character; and (7) that the petitioner married the abuser in good faith, and not for the purpose of evading immigration laws." *Id.* at 653 (citation omitted). The most difficult criteria for a victim to prove is the "credible evidence of battery" though orders of protection are used and considered to be "convincing" evidence of battery. *Id.*

<sup>182</sup> A nonimmigrant visa is one that is "issued to persons with a permanent residence outside the U.S. but who wishes to be in the U.S. on a temporary basis" as opposed to an immigrant visa which is issued to a person who plans to change his residency to the United States. U.S. DEPT OF HOMELAND SEC., *Immigrant Visas v. Nonimmigrant Visas*, U.S. CUSTOMS AND BORDER PROTECTION, [https://help.cbp.gov/app/answers/detail/a\\_id/72/-/immigrant-visas-vs.-nonimmigrant-visas](https://help.cbp.gov/app/answers/detail/a_id/72/-/immigrant-visas-vs.-nonimmigrant-visas) (last visited May 1, 2015).

<sup>183</sup> Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(15)(U) (2012).

<sup>184</sup> *Id.*

<sup>185</sup> U.S. DEPT OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RES GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT 2-3, available at [http://www.dhs.gov/xlibrary/assets/dhs\\_u\\_visa\\_certification\\_guide.pdf](http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf).

<sup>186</sup> 8 U.S.C. § 1101 (a)(15)(U).

parent's petition, but the enumerated crimes do not include child specific "civil-crimes" like neglect, abuse, or abandonment.<sup>187</sup> In addition, the U-Visa is a nonimmigrant visa, and beneficiaries do not become eligible to petition for LPR status until two years after they have held U-Visa status.<sup>188</sup> For SIJS beneficiaries, timely processing is important because federal and state college financial aid often depend upon one's legal immigration status.<sup>189</sup> Thus, the U-Visa is not a viable solution for children like Jane who might have only suffered civil rather than criminal harms and who rely on expedient processing in order to lead stable lives.

In addition, a parent could petition for a U-Visa and include his or her child as a derivative on the application, but derivative status is not adequate immigration relief for a vulnerable child. Jane's mother may be ineligible for a U-Visa for a variety of fairly common reasons, including "some aspect of [a parent's] background such as a criminal record or immigration violation, or [] simply unsuccessful[ly] steering a course through the minefield of immigration by, for example, not using an attorney but rather trusting a 'notario' who files botched papers."<sup>190</sup> Battered spouses are often deterred from seeking help from the police because of the fear of deportation or arrest.<sup>191</sup> Seth Wessler conducted research about family strife and found "[i]n numerous cases, police arrested victims of domestic violence while investigating a report of abuse."<sup>192</sup> This same deterrence might also prevent a parent from seeking an order of protection on behalf of a child, but a parent's failure to seek an order of protection is not damning to a child's ability to seek a civil protection order. In many states, child protective services may seek an order of protection on behalf of a child or the child herself may petition the court for protection.<sup>193</sup>

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<sup>187</sup> 8 U.S.C. § 101(a)(15)(V).

<sup>188</sup> Liebmann, *supra* note 36, at 655.

<sup>189</sup> Adelson, *supra* note 5, at 83.

<sup>190</sup> David B. Thronson, *Custody and Contradictions: Exploring Immigration Law As Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 480 (2008). These same reasons illustrate why VAWA derivative status described *supra* note 176 also provides inadequate protection to children.

<sup>191</sup> SETH FREED WESSLER, APPLIED RESEARCH CENTER, SHATTERED FAMILIES; THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 33 (2011), available at <http://www.immigrationresearch-info.org/report/other/shattered-families-perilous-intersection-immigration-enforcement-and-child-welfare-syst> (click link for "Report File"); Liebmann, *supra* note 36, at 655; WESSLER, *supra*, at 33.

<sup>192</sup> *Id.*

<sup>193</sup> "State protection-order statutes fall loosely into three groups with regard to standing for minor petitioners: (1) statutes that expressly grant standing to some or all minors; (2) statutes that expressly deny standing to some or all minors; and (3)

It is extremely difficult to secure a U-Visa given the high demand and potential hurdles.<sup>194</sup> As a result, the U-Visa is not a viable option for children like Jane, and regulatory action remains the most feasible, practical solution to protect undocumented children who live in homes where there is domestic violence.

## CONCLUSION

SIJS legislation has had a tumultuous history, beginning as a remedy intended for foster care children and currently utilized as a more comprehensive, child-specific immigration remedy because of the lack of any comparable child-specific immigration relief.<sup>195</sup> Given the recent influx of children across the southern border of the United States, the need for child-specific immigration reforms has become a politically, emotionally, and economically charged conversation in the public sphere.<sup>196</sup> Yet, the disturbing reality is that many undocumented children are vulnerable, not as they cross the border seeking a better life, but after arriving in the United States where they live in the shadows.

If there were a principled reason to justify the distinctions that SIJS legislation makes in determining eligibility for a state special findings order, perhaps the conversation about the problems with SIJS would be troubling but brief. However, there is no reasonable explanation for the distinctions. Advocates who continue to argue for legislative expansion of SIJS risk wasting their efforts in the current political climate. The increased tension at the southern border of the United States and the amplified dialogue around illegal immigrants living in the United States add to the already charged nature of the immigration debate.<sup>197</sup> Rather, advocates should focus their efforts on data collection and regulatory action, which will provide a faster and less politically charged process.

Advocates must make efforts to increase data collection of SIJS seekers in the state courts and those who file with USCIS. Some have recognized this informational gap and

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statutes that are ambiguous or silent on the issue.” Martin, *supra* note 131, at 469-71 (citations omitted).

<sup>194</sup> The 10,000 U-Visa quota is routinely met within the first several months of each fiscal year. Kowalski, *supra* note 177.

<sup>195</sup> See *supra* Part I.

<sup>196</sup> Hulse, *supra* note 42; see also Preston, *supra* note 3.

<sup>197</sup> See *supra* Part III.B.

begun efforts to collect comprehensive data about the landscape of children seeking SIJS. The most notable effort has been put forth by Jacqueline Bhabha and Susan Schmidt who collected SIJS data organized by state in an attempt to determine where SIJS education efforts should be focused.<sup>198</sup> More projects of this kind, or state efforts to collect and compute data related to children who petition juvenile courts for special findings orders, are needed to better understand the population of children seeking SIJS relief.

Regulatory action avoids the politics of the legislative process and remains consistent with the traditional understanding that SIJS was meant for the most vulnerable children. Immigration fraud would not likely increase by extending dependency to include a child who successfully obtained a permanent civil order of protection. In fact, it is consistent with the purpose of SIJS to protect the most vulnerable children. There is a striking difference in vulnerability between a child who never knew a parent and a child who was actively abused by a parent. Susy never knew her father, and the court found that sufficient to determine that he abandoned her.<sup>199</sup> In contrast, Jane witnessed and experienced abuse at the hands of her father but only qualified for the special findings order on appeal.<sup>200</sup> The proposed regulation further aligns the reach of SIJS with its purpose so that SIJS will protect rather than exclude vulnerable children who are just as deserving, if not more, than those currently benefiting from SIJS relief.

*Shannon Aimée Daugherty*<sup>†</sup>

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<sup>198</sup> See generally Bhabha & Schmidt, *supra* note 99, at tbl 2.

<sup>199</sup> *In re Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 714-17 (App. Div. 2013).

<sup>200</sup> Family Court Decision, *supra* note 20.

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# Exempt No More

## HOW NEW YORK'S UNIFORM FRAUDULENT CONVEYANCE ACT THREATENS EXEMPTIONS IN BANKRUPTCY

### INTRODUCTION

Imagine you are living in western New York. You have a house that you own free and clear.<sup>1</sup> However, in the past, you had some money troubles and one of your creditors has filed a lawsuit against you seeking payment of the debt. In the meantime, you get married and transfer a one-half interest in the house to your spouse. A few years later, you lose your job, and there is no way you are going to be able to pay off your debts. In the face of mounting bills and no regular income, you decide the best course is to file for bankruptcy. You meet with a lawyer and go over your finances. The house is only worth around \$70,000 so it is exempt under New York law—that is, it cannot be taken by creditors to satisfy a judgment or sold during bankruptcy.<sup>2</sup> The lawyer tells you that you will be able to keep the house and get a fresh start. After all, that is what bankruptcy is designed to do.

But there is a problem. After you file, the trustee alleges that the transfer of the one-half interest to your spouse was fraudulent under New York law.<sup>3</sup> As a result, the trustee can avoid the transfer and pull that one-half interest into the estate.<sup>4</sup> Even worse, once the interest has been pulled back into the estate, the house is no longer exempt.<sup>5</sup> Now the house can be sold by the trustee, leaving you and your spouse homeless.

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<sup>1</sup> That is, not subject to any mortgages or liens.

<sup>2</sup> N.Y. C.P.L.R. § 5206 (McKinney 2012).

<sup>3</sup> N.Y. DEBT. & CRED. LAW § 273-a (McKinney 2012).

<sup>4</sup> 11 U.S.C. §§ 544(b), 551 (2013).

<sup>5</sup> 11 U.S.C. §§ 522(g), 550, 551. Sections 550 and 551 provide that property recovered by the trustee in an avoidance action is preserved for the benefit of the estate. Section 522(g) makes it clear that such property is no longer subject to exemption by providing that certain types of property may still be exempted under certain circumstances. See, e.g., *Hitt v. Glass*, (In re Glass), 164 B.R. 759, 764-65 (B.A.P. 9th Cir. 1994) *aff'd*, 60 F.3d 565 (9th Cir. 1995).

The Bankruptcy Court for the Western District of New York recently came to this conclusion in *In re Panepinto*.<sup>6</sup> In facts largely similar to the hypothetical case outlined above, the court held that a transfer of exempt property could be constructively fraudulent under New York law and, after the trustee avoided the transfer, the property was no longer exempt.<sup>7</sup>

In most states, this would not happen. The result in *Panepinto* is due to the fact that New York continues to use the outdated Uniform Fraudulent Conveyance Act (UFCA).<sup>8</sup> The vast majority of states have adopted the more modern Uniform Fraudulent Transfer Act (UFTA).<sup>9</sup> The UFTA defines “transfer” to exclude exempt property.<sup>10</sup> However, the UFCA, and New York’s version of it, do not.<sup>11</sup> According to the *Panepinto* court, under New York law, a transfer of property can be fraudulent as to the transferor’s creditors regardless of the property’s exempt status.<sup>12</sup> In the past, this particular quirk of the law may not have received much attention because New York only allowed a modest homestead exemption.<sup>13</sup> However, because the homestead exemption was subsequently increased, the amount of money at stake is now much greater making this an issue worth litigating.<sup>14</sup>

Fraudulent transfer law is designed to protect creditors by preventing debtors from hiding property that can and should be used to satisfy debts.<sup>15</sup> At the most basic level, it allows creditors to recover property and undo transfers that debtors make in an attempt to hinder, delay, or defraud their creditors. However, when a debtor transfers exempt property, no creditor is harmed. Regardless of the transfer, creditors had no right to the property in the first place. Allowing the fraudulent transfer laws

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<sup>6</sup> *In re Panepinto*, 487 B.R. 370 (Bankr. W.D.N.Y. 2013).

<sup>7</sup> *See id.* at 374-75.

<sup>8</sup> *See Uniform Fraudulent Conveyance Act*, PRACTICAL LAW, <http://us.practicallaw.com/9-382-3892> (last visited Jan. 18, 2015).

<sup>9</sup> *See UNIF. FRAUDULENT TRANSFER ACT*, references & annots (1984), available at [http://www.uniformlaws.org/shared/docs/fraudulent%20transfer/UFTA\\_Final\\_1984.pdf](http://www.uniformlaws.org/shared/docs/fraudulent%20transfer/UFTA_Final_1984.pdf). Forty-three states as well as the District of Columbia and the Virgin Islands have adopted the UFTA. *Id.*

<sup>10</sup> UNIF. FRAUDULENT TRANSFER ACT § 1.

<sup>11</sup> N.Y. DEBT. & CRED. LAW § 270 (McKinney 2012).

<sup>12</sup> *Panepinto*, 487 B.R. at 371.

<sup>13</sup> Until 2005, New York only allowed debtors to exempt \$10,000 worth of real property used as a primary residence. The current amount ranges from \$75,000 to \$150,000 depending on county of residence. *See id.* The exemptions are found in New York Civil Practice Law and Rules section 5206 and are made applicable to bankruptcy by New York Debtor & Creditor Law sections 282-284. N.Y. C.P.L.R. § 5206 (McKinney 2012); N.Y. DEBT. & CRED. LAW §§ 282-284.

<sup>14</sup> *Panepinto*, 487 B.R. at 374.

<sup>15</sup> *See generally* Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829 (1985).

to reach exempt property does not rectify a wrong; it commits one. Extending fraudulent transfer law to such transfers allows creditors to reach property they have no right to simply because the debtor was not aware of the implications of the transfer.

The National Conference of Commissioners on Uniform State Laws' (the Conference) recently released version of the UFTA provides an excellent framework to guide New York in updating its fraudulent transfer law.<sup>16</sup> In addition to protecting transfers of exempt assets, the new version modernizes and updates fraudulent transfer law. The revisions seek to do away with the confusing labels of "constructive fraud" and "actual fraud."<sup>17</sup> This is an important modernization of the law given that much of what is currently covered by fraudulent transfer law does not require any fraudulent intent at all. The new Act would replace "fraudulent" with "voidable" and help eliminate confusion around interpretation of the law.<sup>18</sup>

This Note will examine the decision in *Panepinto* and argue that it is time for New York to adopt the UFTA. In Part I, the Note will briefly explain the history and purposes behind both the homestead exemption and fraudulent transfer law. This part will also discuss the interaction between state fraudulent transfer law and the federal Bankruptcy Code. Part II will examine *Panepinto* in depth and compare it to a similar case in a jurisdiction that has adopted the UFTA. Part III will establish that there is no basis in current law for reversing the decision in *Panepinto* and will advocate that the New York legislature adopt the newest version of the UFTA.

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<sup>16</sup> NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, UNIF. VOIDABLE TRANSACTIONS ACT (formerly THE UNIF. FRAUDULENT TRANSFER ACT) (as amended in 2014), *available at* [http://www.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2014AM\\_AUFTA\\_Draft\\_As%20approved.pdf](http://www.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2014AM_AUFTA_Draft_As%20approved.pdf).

<sup>17</sup> Actual fraud is based on intentional deception. 37 AM. JUR. 2D *Fraud and Deceit* § 8 (2014). Constructive fraud is based on specific, legally defined actions which are presumed fraudulent regardless of the actor's intent. *Id.* at § 9. This means that a person can technically be guilty of "fraud" without having any real intent to deceive whatsoever. In light of the common understanding of the word "fraud," applying that label to transfers where there is no intent to deceive can be confusing.

<sup>18</sup> NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, AMENDMENTS TO UNIF. FRAUDULENT TRANSFER ACT reporter's introductory note (2013), *available at* [http://www.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2013AM\\_AUFTA\\_Draft.pdf](http://www.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2013AM_AUFTA_Draft.pdf).



## I. HOMESTEAD EXEMPTIONS AND FRAUDULENT TRANSFERS

### A. *History and Purpose of Homestead Exemptions*

American homestead exemption laws originated in Texas in the 1830s.<sup>19</sup> The laws generally exempt a portion or all of the value of a debtor's home from being used to satisfy judgments against the debtor. Currently, most states as well as the Bankruptcy Code have some form of homestead exemption.<sup>20</sup> The purpose "of homestead exemption laws is to protect home equity, preserve home ownership, avoid the eviction of families, and minimize the need for public welfare and housing assistance."<sup>21</sup>

These exemptions represent a balancing act between enforcing credit agreements and ensuring that debtors do not end up as wards of the state.<sup>22</sup> Enforcing the right of lenders and other creditors to paid is important to ensure an adequate supply of credit, but "the social cost of leaving a debtor and his family without resources may outweigh the economic disadvantages of immunizing property from the claims of creditors."<sup>23</sup>

State-level homestead exemptions generally work to prevent a judgment creditor from forcing a sale of the debtor's home to satisfy the judgment.<sup>24</sup> Almost all states exempt at least a portion of the debtor's homestead from being used to satisfy money judgments against the owner.<sup>25</sup> These exemptions apply in bankruptcy through 11 U.S.C. § 522(b).<sup>26</sup> That provision generally exempts from the estate "any property that is exempt under . . . State or local law."<sup>27</sup> This mechanism

<sup>19</sup> George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1289 (1950); see also *State Homestead Exemption Laws*, 46 YALE L.J. 1023 (1937).

<sup>20</sup> See Haskins, *supra* note 19; 11 U.S.C. § 522(d) (2013).

<sup>21</sup> Timothy R. Tarvin, *Bankruptcy, Relocation, and the Debtor's Dilemma: Preserving Your Homestead Exemption Versus Accepting the New Job Out of State*, 43 LOY. U. CHI. L.J. 141, 144 (2011).

<sup>22</sup> *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1459 (1959) [hereinafter *Bankruptcy Exemptions*].

<sup>23</sup> *Id.*

<sup>24</sup> When a party recovers a money judgment in a lawsuit, it becomes a judgment creditor of the debtor. If the debtor does not have sufficient cash to pay the judgment (or refuses to), the judgment creditor can then levy the assets of the debtor and force a sale. The judgment creditor is then paid from the proceeds of the sale. Exemption law, including the homestead exemption, protects certain assets of the debtor from this process. See generally 31 AM. JUR. 2D *Exemptions* § 223 (2014); 46 AM. JUR. 2D *Judgments* (2014).

<sup>25</sup> See, e.g., N.Y. C.P.L.R. § 5206 (McKinney 2012); TEX. PROP. CODE ANN. § 41.001 (2001).

<sup>26</sup> 11 U.S.C. § 522(b) (2013).

<sup>27</sup> *Id.* § 522(b)(3)(A). There are some limitations and exceptions both in the Bankruptcy Code and in state law, but the basic starting point is that a debtor in

allows a debtor in bankruptcy to use state exemption laws to protect her property from being liquidated to pay creditors.<sup>28</sup>

One of the central features of bankruptcy law is the ability to provide the “honest but unfortunate debtor” a “fresh start.”<sup>29</sup> Saving the debtor’s home is often central to the debtor’s potential to rebuild his finances. In addition to the potential loss of equity, individuals without homes often struggle to find jobs.<sup>30</sup> Increasing the number of homeless and jobless people puts stress on the social system and drains resources from the state. Allowing debtors to retain their homes promotes the goal of giving honest but unfortunate debtors a fresh start. While there are costs associated with exempting what is typically a debtor’s largest asset from execution, the costs of evicting everyone who cannot pay their debts and leaving them out on the street can more than outweigh the costs to the credit system.<sup>31</sup> Absent exemptions, debtors may be forced to rely on public assistance, which means the state will have to raise additional taxes or divert revenue from other sources.

Homestead exemptions also represent a policy choice by lawmakers to protect “the security of the family” which “prevents pauperism and provides the members of the family with some measure of stability and independence.”<sup>32</sup> As one court put it, “preservation of the home is deemed of paramount importance.”<sup>33</sup> In addition to providing economic advantages to the debtor, home ownership is of public value as it is thought to connect people to their communities and “cultivate the interest, pride, and affection of the individual, so essential to the stability and prosperity of government.”<sup>34</sup> Since the legislature has

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bankruptcy can exempt whatever property that state law exempts from being used to satisfy judgments.

<sup>28</sup> *Id.* § 522(b). Federal law also contains a homestead exemption for bankruptcy. Under 11 U.S.C. § 522(d)(1), a debtor can currently exempt up to \$22,975 of his or her aggregate interest in property that the debtor uses as a residence. Generally speaking, a debtor can elect to use either the federal or state exemption scheme. Note that exemption values (and many other dollar amounts) in the Bankruptcy Code are periodically adjusted for inflation under 11 U.S.C. § 104. This note uses the dollar values in effect as of the year 2014.

<sup>29</sup> *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991).

<sup>30</sup> See Christine Schanes, *Homelessness Myth #1: “Get a Job!”*, HUFFINGTON POST (June 13, 2010, 11:22 PM), [http://www.huffingtonpost.com/christine-schanes/homelessness-myth-1-get-a\\_b\\_339500.html](http://www.huffingtonpost.com/christine-schanes/homelessness-myth-1-get-a_b_339500.html).

<sup>31</sup> *Bankruptcy Exemptions*, *supra* note 22, at 1459.

<sup>32</sup> Haskins, *supra* note 19, at 1289.

<sup>33</sup> *In re Estate of Dodge*, 685 P.2d 260, 263 (Colo. App. 1984).

<sup>34</sup> *Id.*; see also *Ferguson v. Kumler*, 6 N.W. 618, 619 (Minn. 1880) (“The [homestead exemption] originated in the wise and humane policy of securing to the citizen against all the misfortunes and uncertainties of life the benefits of a home not in the interest of [the homeowner] alone, but likewise in the interest of the state, whose welfare and prosperity so largely depend upon the growth and cultivation among its citizens of feelings of personal independence, together with love of country and

chosen to enact a policy of protecting the home through the exemption laws, these laws "should be liberally construed so as to carry out the legislative intent."<sup>35</sup>

### B. *History and Purpose of Fraudulent Transfer Laws*

Fraudulent transfer law, in its most basic form, allows a creditor to avoid transfers made by a debtor that were intended to hinder, delay, or defraud creditors.<sup>36</sup> In short, a debtor should not be able to avoid paying his or her debts by transferring property to a friend only to reclaim it after the creditors have settled with the debtor or given up. These laws can be traced back to sixteenth century English common law and the 1571 Statute of Fraudulent Conveyances.<sup>37</sup> England at the time "had certain sanctuaries into which the King's writ could not enter."<sup>38</sup> Creditors could not go after a debtor taking refuge in a sanctuary.<sup>39</sup> If the debtor no longer held any property, the creditors were left without recourse and would often settle their claims for a relatively small amount.<sup>40</sup>

The Statute of Fraudulent Conveyances made "illegal and void any transfer made for the purpose of hindering, delaying, or defrauding creditors."<sup>41</sup> The basic structure, to hinder, delay, or defraud creditors, survives in almost all modern fraudulent transfer law.<sup>42</sup> However, the subjective intent of the debtor is difficult to prove.<sup>43</sup> To decide which transfers are intended to hinder, delay, or defraud, courts generally have to rely on circumstantial evidence to infer the debtor's motives.

To address these difficulties, courts have developed a series of factors that can be used as circumstantial evidence of

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kindred-sentiments that find their deepest root and best nourishment where the home life is spent and enjoyed.").

<sup>35</sup> *Ferguson*, 6 N.W. at 619.

<sup>36</sup> Baird & Jackson, *supra* note 15, at 829.

<sup>37</sup> 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 58 (1940).

<sup>38</sup> *Id.* at § 61.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* While the Statute of Fraudulent Conveyances is often cited as being designed to prevent this practice, that is not the whole story. There existed at the time common law that allowed creditors to go after the assets of debtors who had taken sanctuary. For more on this, see *id.* at §§ 58-61e.

<sup>41</sup> Baird & Jackson, *supra* note 15, at 829.

<sup>42</sup> Frank R. Kennedy, *Involuntary Fraudulent Transfers*, 9 CARDOZO L. REV. 531, 537 (1987) [hereinafter Kennedy, *Involuntary*].

<sup>43</sup> Frank R. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 UCC L.J. 195, 196 (1986) [hereinafter Kennedy, *UFTA*].

fraudulent intent, often referred to as the badges of fraud.<sup>44</sup> Applying these badges, the court can presume fraudulent intent if certain conditions are met without regard to the actual intent of the transferor.<sup>45</sup> One of the historic badges is a transfer of property by an insolvent debtor without fair compensation.<sup>46</sup> This particular badge was codified in the UFCA and made a part of the laws of the states that adopted it.<sup>47</sup> No showing of intent is required.<sup>48</sup> If the conditions are met, the transfer may be avoided.<sup>49</sup> This is typically referred to as constructive fraud.<sup>50</sup> It is suggested that the drafters of the UFCA specifically intended the law to capture transfers made by insolvent debtors for less than fair value even if there was no intent to hinder, delay, or defraud creditors.<sup>51</sup> The law treats the transfer as fraudulent to the debtor's creditors regardless of the debtor's actual motive.

New York adopted the UFCA in 1925.<sup>52</sup> The Act is currently codified in New York Debtor & Creditor Law (NYDCL) sections 270, *et seq.*<sup>53</sup> The relevant provisions are the constructive fraud provisions in sections 273 to 275. These provisions apply "without regard to [the] actual intent" of the transferor.<sup>54</sup> Any

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<sup>44</sup> Baird & Jackson, *supra* note 15, at 830 (citations omitted); Philco Fin. Corp. v. Pearson, 335 F. Supp. 33, 40-41 (N.D. Miss. 1971). Badges of fraud include:

- (1) the lack or inadequacy of consideration;
- (2) the family, friendship or close associate relationship between the parties;
- (3) the retention of possession, benefit or use of the property in question;
- (4) the financial condition of the party sought to be charged both before and after the transaction in question;
- (5) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and
- (6) the general chronology of the events and transactions under inquiry

Salomon v. Kaiser (*In re Kaiser*), 722 F.2d 1574, 1582-83 (2d Cir. 1983).

<sup>45</sup> Kennedy, *Involuntary*, *supra* note 42, at 537-38.

<sup>46</sup> See Baird & Jackson, *supra* note 15, at 830.

<sup>47</sup> 11 U.S.C. § 548(a)(1)(B) (2013); N.Y. DEBT. & CRED. LAW § 273 (McKinney 2012); UNIF. FRAUDULENT TRANSFER ACT § 5(a) (1984), *available at* [http://www.uniformlaws.org/shared/docs/fraudulent%20transfer/UFTA\\_Final\\_1984.pdf](http://www.uniformlaws.org/shared/docs/fraudulent%20transfer/UFTA_Final_1984.pdf); UNIF. FRAUDULENT CONVEYANCE ACT § 4 (1918).

<sup>48</sup> N.Y. DEBT. & CRED. LAW § 273 ("Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors *without regard to his actual intent* if the conveyance is made or the obligation is incurred without a fair consideration.") (emphasis added).

<sup>49</sup> See Sklaroff v. Rosenberg, 125 F. Supp. 2d 67, 74 (S.D.N.Y. 2000), *aff'd*, 18 F. App'x 28 (2d Cir. 2001).

<sup>50</sup> See 37 AM. JUR. 2D *Fraud and Deceit* § 9 (2014).

<sup>51</sup> Baird & Jackson, *supra* note 15, at 831-32.

<sup>52</sup> GLENN, *supra* note 37, at § 62 n.73.

<sup>53</sup> See HBE Leasing Corp. v. Frank, 48 F.3d 623, 633 (2d Cir. 1995).

<sup>54</sup> N.Y. DEBT. & CRED. LAW §§ 273-274 (McKinney 2012).

conveyance made that meets the requirements of sections 273 to 275 can be deemed fraudulent without any showing that the debtor intended to hinder, delay, or defraud his or her creditors.<sup>55</sup> Once such a conveyance is deemed fraudulent, the creditors can have the conveyance annulled, set aside, or directly levy on the property as if the conveyance never happened.<sup>56</sup>

To understand the issues raised in *Panepinto*, it is important to look in detail at some sections of New York's UFCA, particularly sections 270 to 273-a.<sup>57</sup> Section 273 makes fraudulent any conveyance made without fair consideration by a person who is insolvent or is made insolvent by the conveyance.<sup>58</sup> Section 271 defines a person as insolvent "when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured."<sup>59</sup> Section 273-a makes fraudulent any conveyance made without fair consideration by a person who is a defendant in an action for money damages if the final judgment is not paid.<sup>60</sup>

To avoid a transfer under sections 273 and 273-a, the party seeking to avoid the transfer must show that the transferor did not receive fair consideration.<sup>61</sup> Section 272 defines fair consideration as receiving property that is a fair equivalent to the property transferred or the satisfaction of an antecedent debt.<sup>62</sup> It can also include an exchange that is not equivalent so long as it is not "disproportionately small as compared with the value of the property, or obligation obtained."<sup>63</sup> Section 270 also contains some important definitions. First, a "[c]onveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any

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<sup>55</sup> See *Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC*, 842 F. Supp. 2d 661, 666 (S.D.N.Y. 2012); see also *Julien J. Studley, Inc. v. Lefrak*, 412 N.Y.S.2d 901, 905 (App. Div. 1979), *aff'd*, 401 N.E.2d 187 (N.Y. 1979).

<sup>56</sup> N.Y. DEBT. & CRED. LAW § 278.

<sup>57</sup> *In re Panepinto*, 487 B.R. 370, 372 (Bankr. W.D.N.Y. 2013). The court only discusses constructive fraud in relation to section 273-a, but the creditors raised both sections 273 and 273-a in their motion. Further, the analysis the court uses could apply equally to any of the constructive fraud provisions found in sections 273-275. For purposes of this note, I will focus only on sections 273 and 273-a. Sections 270-272 supply important definitions that are referenced in §§ 273 and 273-a.

<sup>58</sup> N.Y. DEBT. & CRED. LAW § 273.

<sup>59</sup> *Id.* § 271.

<sup>60</sup> *Id.* § 273-a.

<sup>61</sup> *Id.* §§ 273 & 273-a.

<sup>62</sup> *Id.* § 272(a).

<sup>63</sup> *Id.* § 272(b).

lien or incumbrance.”<sup>64</sup> Second, “‘assets’ of a debtor means property not exempt from liability for his debts.”<sup>65</sup>

In summary, the essential rules are: (1) a transfer made for no consideration while a person is insolvent or a defendant in a lawsuit can be deemed fraudulent without any intent on the part of the debtor to hinder, delay, or defraud her creditors and; (2) the word “conveyance” as used in these statutes covers any type of property including property that would normally be exempt from execution by creditors. Taken together, these points mean that a creditor could technically seek the avoidance of a conveyance of property even though the property cannot be used to satisfy the debtor’s obligation. However, there is little incentive to seek avoidance in such a case because even if the conveyance is set aside or annulled, the creditor still cannot levy on the property.<sup>66</sup> In this situation, returning the property to the debtor does not help the creditor’s position at all. This all changes once we add the Bankruptcy Code into the mix.

### C. *How State Fraudulent Conveyance Law Interacts with the Bankruptcy Code*

The Bankruptcy Code has its own fraudulent conveyance provisions, namely 11 U.S.C. §§ 547 and 548. Section 547 covers preferential payments<sup>67</sup> and § 548 mirrors the core provisions of the UFCA but vests the power to avoid fraudulent transfers in the trustee rather than the creditors.<sup>68</sup>

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<sup>64</sup> *Id.* § 270.

<sup>65</sup> *Id.*

<sup>66</sup> See *Corbin v. Litke*, 431 N.Y.S.2d 800, 802 (N.Y. Sup. Ct. 1980) (holding that homestead exemption would still apply after avoidance of transfer).

<sup>67</sup> In general, a preference is a payment made by a debtor, while insolvent, on account of an antecedent debt, to a creditor within 90 days of the debtor filing for bankruptcy. For more information, see generally Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3 (1986) and Vern Countryman, *The Concept of A Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713 (1985).

<sup>68</sup> 11 U.S.C. § 548(a)(1) (2013) provides that:

The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

In addition to these specific avoidance statutes, the trustee can also take advantage of the relevant state-level fraudulent transfer law through § 544. That section generally gives the trustee the power to avoid any transfer that a creditor of the debtor could avoid under applicable law.<sup>69</sup> In New York, this would include NYDCL sections 273 and 273-a.

Assuming the trustee avoids the transfer of exempt property under one of these provisions, what happens next? As noted above, the likely result under state law outside of bankruptcy would be that the creditor is still prevented from going after the exempt property.<sup>70</sup> However, that is not the result under the Bankruptcy Code. Under 11 U.S.C. §§ 551 and 522(g), the exempt property will not only return to the estate but will also lose its exempt status.<sup>71</sup> Section 551 simply states that any property recovered through an avoidance action in bankruptcy becomes property of the estate.<sup>72</sup> Once the property is back in the estate, § 522(g) ensures that the exemption no longer applies.<sup>73</sup> So long as the transfer was voluntary, the

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1).

<sup>69</sup> 11 U.S.C. § 544(b)(1) (“[T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.”).

<sup>70</sup> See *Corbin*, 431 N.Y.S.2d at 802. In this case the creditors successfully avoided a conveyance of real estate between husband and wife as fraudulent, but the court stated that the defendants would be entitled to the full statutory homestead exemption if the property was properly designated as a homestead. *Id.*

<sup>71</sup> *Hitt v. Glass (In re Glass)*, 164 B.R. 759, 764 (B.A.P. 9th Cir. 1994), *aff’d*, 60 F.3d 565 (9th Cir. 1995) (“The purpose of § 522(g) is to prevent a debtor from claiming an exemption in recovered property which was transferred in a manner giving rise to the trustee’s avoiding powers, where the transfer was voluntary or where the transfer or property interest was concealed.”).

<sup>72</sup> 11 U.S.C. § 551 (“Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate.”).

<sup>73</sup> 11 U.S.C. § 522(g).

estate gets the benefit of the recovered property regardless of its exemption status.

Thus, under a state law action, even if a creditor can avoid a transfer as fraudulent, the debtor is still entitled to the statutory exemptions. However, because of §§ 551 and 522(g) of the Bankruptcy Code, when a trustee does the same thing in bankruptcy, the debtor is no longer entitled to claim exemptions in the property. To illustrate this problem, we now turn to *Panepinto*.

## II THE UFCA AND THE UFTA IN ACTION

### A. UFCA: *Panepinto*

*Panepinto* was originally filed as a chapter 7 liquidation case on April 23, 2012.<sup>74</sup> It was later converted to a chapter 13 case on July 17, 2012, and the debtor filed a plan under 11 U.S.C. § 1322.<sup>75</sup> The debtor listed her residence, a home she owned jointly with her husband, as an exempt homestead under New York Civil Practice Law and Rules (NYCPLR) section 5206. However, the debtor originally owned the home by herself, free and clear of any liens. In 2008, she transferred an ownership interest to her husband, and since that time, they held the house jointly as tenants in the entirety. At the time the transfer was

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(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) the debtor could have avoided such transfer under subsection (f)(1)(B) of this section.

*Id.*

<sup>74</sup> See Docket, *In re Panepinto*, 487 B.R. 370 (Bankr. W.D.N.Y. 2013) (No. 12-11230) [hereinafter *Panepinto* Docket].

<sup>75</sup> See *id.* In a Chapter 13 case, the debtor is required to file a plan that meets the requirements of 11 U.S.C. §§ 1322 & 1325. Unlike a Chapter 7 liquidation case where a debtor surrenders all non-exempt property but keeps his or her future income, a Chapter 13 case generally allows a debtor to keep all of his or her assets while pledging to pay creditors from future income. The plan details the terms of those future payments and, in general, must provide for payments to creditors that at least equal what the creditors would have received in a Chapter 7 liquidation. See generally 9 AM. JUR. 2D §§ 68, 72 *Bankruptcy*.



made, the debtor was the defendant in an action seeking a money judgment filed by Target National Bank.<sup>76</sup>

After the debtor filed her chapter 13 plan, two of the creditors objected to the plan arguing, *inter alia*, that the transfer of the ownership interest to the debtor's husband was fraudulent under both NYDCL sections 273 and 273-a.<sup>77</sup> The transfer could be held fraudulent under section 273 because New York law presumes the debtor is insolvent when the transfer is voluntary and the debtor does not receive fair consideration.<sup>78</sup> The transfer could also be fraudulent under section 273-a because, at the time of the transfer, the debtor was a defendant in an action for monetary damages and had not paid the final judgment.<sup>79</sup>

The debtor filed a motion to dismiss the objections arguing, *inter alia*, that the transfer was not fraudulent because the interest transferred was subject to state exemption law.<sup>80</sup> The creditors argued that New York's version of the UFCA defines "conveyance" as any "payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property," and the term "property" includes exempt property.<sup>81</sup> The court agreed with the creditors. It noted that, despite the many cases from other states that held differently, under New York law the transfer could be avoided.<sup>82</sup> The court attributed the inconsistency to the fact that New York still uses the UFCA while nearly every other state has adopted the UFTA. Both the UFTA and the UFCA define "asset" to exclude exempt property of the debtor.<sup>83</sup> However, the UFTA defines "transfer" as disposing or parting with an "*asset*" and

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<sup>76</sup> Objections Pursuant to 11 U.S.C. 1325 and Bankruptcy Rules 3020[.] 11 U.S.C. 522(l) and Bankruptcy Rules 4003, Opposition to Debtor's Motion Pursuant to 11 U.S.C. 522(f) at ¶ 1.e, *In re Panepinto*, 487 B.R. 370 (Bankr. W.D.N.Y. 2013) (No. 12-11230-MJK) [hereinafter: *Creditor's Objections*].

<sup>77</sup> *Id.* at ¶ 1.

<sup>78</sup> *Hassett v. Far West Fed. Sav. & Loan Assoc. (In re O.P.M. Leasing Servs., Inc.)*, 40 B.R. 380, 393 (Bankr. S.D.N.Y. 1984), *aff'd*, 44 B.R. 1023 (S.D.N.Y. 1984). The debtor in *Panepinto* raised the issue of consideration in her motion to dismiss the objections. Debtor's Response to Creditors' Objections Together with Motion to Dismiss Objections at ¶ 17, *In re Panepinto*, 487 B.R. 370 (Bankr. W.D.N.Y. 2013) [hereinafter *Debtor's Response*]. However, the judge did not address this issue when ruling on the motion and the objections and focused instead on section 273-a. *Panepinto*, 487 B.R. at 372. It is undisputed that the debtor was involved in a lawsuit at the time of the transfer and had not paid the judgment so this issue was easier to address. *Creditor's Objections*, *supra* note 76, at ¶ 1(e).

<sup>79</sup> N.Y. DEBT. & CRED. LAW § 273-a (McKinney 2012).

<sup>80</sup> *Debtor's Response*, *supra* note 78.

<sup>81</sup> N.Y. DEBT. & CRED. LAW § 270.

<sup>82</sup> *Panepinto*, 487 B.R. at 374.

<sup>83</sup> See UNIF. FRAUDULENT TRANSFER ACT § 1 (1984); see also N.Y. DEBT. & CRED. LAW § 270.

not “*property*.”<sup>84</sup> Therefore, a transfer of exempt property, by definition, cannot be fraudulent under the UFTA but can be fraudulent under the UFCA. The court also stated that the provisions of 11 U.S.C. §§ 551 and 522(g) would work to eliminate the exemptions the property might be protected by once the transfer was avoided.<sup>85</sup>

It should be noted that the ruling in *Panepinto* did not conclusively decide the case.<sup>86</sup> At this point, no party had filed an adversary proceeding seeking to avoid the transfer.<sup>87</sup> The issue was raised in the context of an objection to the debtor’s chapter 13 plan and the debtor’s motion to dismiss those objections.<sup>88</sup> In ruling on these motions, the court simply denied the debtor’s motion to dismiss the objections, sustained the objections of the creditors, and declined to confirm the plan without prejudice.<sup>89</sup> The court did rule that, as a matter of law, the transfer in this case *could* be avoided, and that if it was, the debtor would not be entitled to an exemption.<sup>90</sup> However, because there was no adversary proceeding before the court seeking to avoid the transfer, the court did not rule that the transfer would be avoided at that time.<sup>91</sup>

In making this ruling, the court explicitly drew a distinction between states that adopted the UFTA and ones that still use the UFCA.<sup>92</sup> The court noted that many courts in different states had held that a transfer of exempt property was not fraudulent.<sup>93</sup> However, the court stated that the language of the UFCA compelled a different result.<sup>94</sup> The court went on to make it clear that the sole basis for its ruling was the difference in language.<sup>95</sup> In a state that has adopted the UFTA, this would not happen.

#### B. UFTA: *In re* Blanch

As the *Panepinto* court noted, there is a significant difference between the terminology in the UFCA and UFTA. In 1979, the Conference decided it was time to update the UFCA

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<sup>84</sup> UNIF. FRAUDULENT TRANSFER ACT § 1(12) (emphasis added).

<sup>85</sup> *Panepinto*, 487 B.R. at 371.

<sup>86</sup> *Id.* at 375.

<sup>87</sup> *See id.* at 374.

<sup>88</sup> *Id.* at 375.

<sup>89</sup> *See id.* at 374-75.

<sup>90</sup> *Id.* at 371.

<sup>91</sup> *Id.* at 374-75.

<sup>92</sup> *Id.* at 373.

<sup>93</sup> *Id.* at 374.

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

and developed the revised UFTA in 1984.<sup>96</sup> The goal was to update the UFCA to accommodate the various changes in other commercial laws since its promulgation in 1918.<sup>97</sup> Currently, 43 states as well as the District of Columbia and the Virgin Islands have adopted the UFTA.<sup>98</sup> One of the most obvious changes made to the law was the change in terminology from conveyance to transfer. The drafters stated that this change was made because the word “conveyance” is closely associated with real estate transfers, and they wanted to make clear the intent of the UFTA to cover all transfers of property.<sup>99</sup> This change was more profound than the drafters realized at the time.

The case of *In re Blanch*, from the Bankruptcy Court for the Central District of Illinois, is illustrative of this point.<sup>100</sup> The facts of *Blanch* are quite similar to *Panepinto*. The debtor had conveyed his otherwise exempt homestead to his parents approximately two years prior to filing for bankruptcy.<sup>101</sup> After the transfer, he continued to reside there.<sup>102</sup> The trustee brought an action against the debtor’s parents to avoid the transfer as fraudulent under Chapter 740 of the Illinois Compiled Statutes sections 160/5 and 160/6.<sup>103</sup> The defendants countered that the transfer was not fraudulent because the property would have been exempt anyway.<sup>104</sup> They pointed out that under Illinois’ version of the UFTA, “transfer” as defined in 160/2 is the “disposing of or parting with an *asset*.”<sup>105</sup> As the court noted, “asset” does not include “property to the extent it is generally exempt under laws of this State.”<sup>106</sup> As a result, the court held that “[p]roperty which is encumbered by a lien or

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<sup>96</sup> Kennedy, *UFTA*, *supra* note 43, at 198.

<sup>97</sup> *Id.* at 198-99.

<sup>98</sup> See UNIF. FRAUDULENT TRANSFER ACT, references & annots (1984). Legislation is also pending in several states to adopt the most recent version of the act. *Legislation*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Legislation.aspx> (last visited Jan. 12, 2015).

<sup>99</sup> Kennedy, *UFTA*, *supra* note 43, at 199.

<sup>100</sup> See *Covey v. Blanch (In re Blanch)*, Nos. 97-82652, 98-8011, 1998 WL 34065289 (Bankr. C.D. Ill. Sept. 11, 1998).

<sup>101</sup> *Id.*, at \*1.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* 740 ILL. COMP. STAT. 160/5 contains the main fraudulent transfer language that covers actual fraud (intent to hinder, delay, or defraud) and fraud related to incurring subsequent debts. 106/6 is the constructive fraud provision that allows avoidance of transfers while the debtor was insolvent. 740 ILL. COMP. STAT. 160/5, 160/6 (2014) (similar to N.Y. DEBT. & CRED. LAW § 273 (McKinney 2012)).

<sup>104</sup> *Blanch*, 1998 WL 34065289, at \*1.

<sup>105</sup> 740 ILL. COMP. STAT. 160/2(l) (emphasis added); *see also Blanch*, 1998 WL 34065289, at \*2.

<sup>106</sup> *Blanch*, 1998 WL 34065289, at \*2 (citing 740 ILL. COMP. STAT. 160/2(b)(2)).

subject to a homestead exemption is not an asset which is subject to recovery as a fraudulent transfer.”<sup>107</sup>

Comparing the results of *Panepinto* and *Blanch*, as well as the court’s discussion in *Panepinto*, shows that the root of the problem is the difference between the UFCA and the UFTA, at least to the *Panepinto* and *Blanch* courts. The next section will consider whether there are any grounds under existing law to overturn the decision in *Panepinto* and argue that the easiest and best solution to avoid this inconsistency is for New York to adopt the UFTA.

### III NEW YORK SHOULD ADOPT THE 2014 UFTA

#### A. *There Are No Grounds Under Existing Law to Overturn This Ruling.*

There are two potential, but ultimately unsuccessful, grounds for overturning the decision in *Panepinto*. First, the reviewing court could decide that these types of transfers are subject to the “no harm, no foul” rule. Second, since this case is interpreting state law, there could be precedent from New York courts holding that transfers of exempt property are not fraudulent under state law. However, there is no precedent directly on point from New York courts to guide the federal courts in interpreting this state law issue.

##### 1. The “No harm, No Foul” Rule

As noted in Part I, both fraudulent transfer and exemption law have been part of the American legal system for many years. Some jurisdictions adopted a “no harm, no foul” rule when determining whether to avoid transfers of exempt property.<sup>108</sup> The basic idea behind this rule is that if the property would not have been available to creditors prior to the transfer then the transfer cannot be fraudulent as to the creditors.<sup>109</sup>

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<sup>107</sup> *Id.*, at \*2. It is interesting to note that the defendants also cited precedent in Illinois law, some of which predates even the UFCA, that held that transfers of exempt property could not be fraudulent. *Id.* It appears that Illinois was an early adopter of the “no harm, no foul” rule for fraudulent transfers. See *infra* Part III.A.1. However, the court did squarely address the language of the UFTA and held that this language completely protects exempt property from fraudulent transfer law. *Blanch*, 1998 WL 34065289, at \*2.

<sup>108</sup> Dana Yankowitz, Comment, “*I Could Have Exempted It Anyway*”: Can A Trustee Avoid A Debtor’s Prepetition Transfer of Exemptible Property?, 23 EMORY BANKR. DEV. J. 217, 227 (2006); see also *Jarboe v. Treiber (In re Treiber)*, 92 B.R. 930, 932 (Bankr. N.D. Okla. 1988).

<sup>109</sup> *Treiber*, 92 B.R. at 932.

Illinois is a good example, and the *Blanch* case discussed above provides a good summary of the case law on the issue. As far back as 1880, well before the adoption of the UFCA, the Illinois Supreme Court held that “[n]o conveyance of property exempt from execution can be considered fraudulent as against a creditor.”<sup>110</sup> However, for both legal and policy reasons, full embrace of the “no harm, no foul” rule is not a viable option.

For the most part, federal courts have rejected the “no harm, no foul” approach when applying the fraudulent transfer provisions found in the Bankruptcy Code itself. Key examples are the Fourth Circuit’s decision in *Tavener v. Smoot*<sup>111</sup> and the Ninth Circuit Bankruptcy Appellate Panel’s decision in *In re Trujillo*.<sup>112</sup> Both cases directly held that a transfer of exempt property under 11 U.S.C. § 548 could be avoided as fraudulent and that § 522(g) prevented the debtors from claiming the property as exempt once the transfer was avoided.<sup>113</sup> Although some bankruptcy courts have explicitly endorsed the “no harm, no foul” rule,<sup>114</sup> the positions taken in *Tavener* and *Trujillo* represent the current majority position.<sup>115</sup>

Despite this, there is some authority for continuing or even expanding the “no harm, no foul” rule. In 1990, the Supreme Court in *Begier v. I.R.S.* seemed to endorse at least a limited version of the “no harm, no foul” rule as to preferences under 11 U.S.C. § 547.<sup>116</sup> The Court found that “an interest of the debtor in property” for purposes of § 547 only includes “that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings.”<sup>117</sup> The Court relied primarily on the policy behind fraudulent transfer law.<sup>118</sup> It stated that the purpose of § 547 was to help insure “[e]quality of distribution among

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<sup>110</sup> *Leupold v. Krause*, 95 Ill. 440, 444 (1880).

<sup>111</sup> *Tavener v. Smoot*, 257 F.3d 401 (4th Cir. 2001).

<sup>112</sup> *Trujillo v. Grimmet (In re Trujillo)*, 215 B.R. 200 (B.A.P. 9th Cir. 1997), *aff’d*, 166 F.3d 1218 (9th Cir. 1998).

<sup>113</sup> *Tavener*, 257 F.3d at 406-07; *Trujillo*, 215 B.R. at 204-05 & n.5.

<sup>114</sup> *See, e.g., Treiber*, 92 B.R. at 932 (“No creditor is injured when the entire subject matter of a preference consists of exempt property. If the property had not been conveyed, the creditors would not have shared in it. In short,—no harm, no foul.”); *Noland v. Turner (In re Turner)*, 45 B.R. 649, 651 (Bankr. S.D. Ohio 1985) (“Thus, it serves no purpose for the Trustee to seek the avoidance of a transfer which removed no non-exempt property from the estate or which does not deplete the estate in some way. Such transfer does not hinder, delay or defraud any creditor, since creditors would not have benefited from the property if there had been no transfer.”).

<sup>115</sup> *See Yankowitz, supra* note 108, at 219.

<sup>116</sup> *Begier v. I.R.S.*, 496 U.S. 53 (1990).

<sup>117</sup> *Id.* at 58.

<sup>118</sup> *See id.*

creditors.”<sup>119</sup> It further stated that “if the debtor transfers property that would not have been available for distribution to his creditors in a bankruptcy proceeding, the policy behind the avoidance power is not implicated.”<sup>120</sup>

While *Begier* only covered preferences under § 547, the Southern District of New York in *Bear, Stearns Sec. Corp. v. Gredd* used the language of *Begier* to extend the rule to § 548.<sup>121</sup> That court stated that:

While *Begier* and its progeny were concerned with § 547 rather than § 548, the “normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning,” counsels us to construe this language to have the same meaning when it is used in § 548(a)(1)(A).<sup>122</sup>

The court ultimately concluded that a transfer could only be avoided when the property would have been available to creditors.<sup>123</sup>

Whether this fully protects transfers of exempt property from avoidance under § 548 is not clear. Technically, the property in *Begier* and *Bear Stearns* was never property of the estate to begin with. Exempt property is considered property of the estate until the debtor elects the exemption.<sup>124</sup> The logic of many courts in allowing § 548 to reach transfers of exempt property focuses on this distinction.<sup>125</sup> Prior to the Bankruptcy Reform Act of 1978, which created the modern Bankruptcy Code, property subject to exemption never became property of the estate.<sup>126</sup> Further, the text of § 522(g) seems to endorse the avoidance of transfers of exempt property since it prevents debtors from asserting an exemption on property that has been recovered by the trustee.<sup>127</sup>

The court in *Panepinto* considered whether the holdings in *Begier* and *Bear Stearns* should guide its decision, but

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Bear, Stearns Sec. Corp. v. Gredd (In re Gredd)*, 275 B.R. 190, 193-94 (Bankr. S.D.N.Y. 2002).

<sup>122</sup> *Id.* at 194 (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)).

<sup>123</sup> *Id.* at 196 (“We thus conclude that § 548(a)(1)(A) only permits a trustee to avoid a transfer of an interest of the debtor in property when, but for the transfer, such property interest would have been available to at least one of the debtor’s creditors.”).

<sup>124</sup> See 11 U.S.C. §§ 522(b), 541(a)(1) (2013). All interests of the debtor become property of the estate per § 541 and the debtor is then allowed to exempt certain property out of the estate per 522(b).

<sup>125</sup> See, e.g., *Tavener v. Smoot*, 257 F.3d 401, 406 (4th Cir. 2001).

<sup>126</sup> *Lasich v. Wickstrom (In re Wickstrom)*, 113 B.R. 339, 347 n.10 (Bankr. W.D. Mich. 1990).

<sup>127</sup> See 11 U.S.C. § 522(g); see also *Trujillo v. Grimmet (In re Trujillo)*, 215 B.R. 200, 205 & n.5 (B.A.P. 9th Cir. 1997).

ultimately decided that the precedents did not apply because the provision at stake was § 544, not §§ 547 or 548.<sup>128</sup> However, the crux of the determinations in *Begier* and its progeny and *Bear Stearns* was the definition of “an interest of the debtor in property.”<sup>129</sup> Those courts held that “an interest of the debtor in property” did not encompass property that would not otherwise be available for creditors.<sup>130</sup> Section 544 uses the same phrase, “an interest of the debtor in property.”<sup>131</sup> The court in *Bear Stearns* based its extension of *Begier* to § 548 in part on the concept that “the ‘normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.’”<sup>132</sup> Since § 544 uses identical words, the same principles that apply to “an interest of the debtor in property” in §§ 547 and 548 should also apply to § 544.

To justify its decision not to extend *Begier* and *Bear Stearns*, the *Panepinto* court stated that the maximum two year “look back” period of §§ 547 and 548 indicates that the focus is on the “slide into bankruptcy” and courts are thus more concerned with the “impact of pre-petition transfers [on] the . . . bankruptcy estate.”<sup>133</sup> The court stated that “§ 544 is different[,]” but did not elaborate.<sup>134</sup> But, even if the court decided that § 544 should be treated the same as §§ 547 and 548, *Begier* and *Bear Stearns* are still not applicable because they dealt with an entirely different type of property. In both cases the property in question was property that would not have been part of the estate in the first place.<sup>135</sup> While both opinions have language that seems to endorse a general “no harm, no foul” rule,<sup>136</sup> the interest in property at stake in

<sup>128</sup> *In re Panepinto*, 487 B.R. 370, 371 n.2 (Bankr. W.D.N.Y. 2013).

<sup>129</sup> *Begier v. I.R.S.*, 496 U.S. 53, 58 & n.1 (1990); *Bear, Stearns Sec. Corp. v. Gredd*, 275 B.R. 190, 194-96 (S.D.N.Y. 2002).

<sup>130</sup> *See Begier*, 496 U.S. at 58; *see also Bear, Stearns*, 275 B.R. at 196.

<sup>131</sup> 11 U.S.C. § 544(b)(1).

<sup>132</sup> *Bear, Stearns*, 275 B.R. at 194 (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)).

<sup>133</sup> *Panepinto*, 487 B.R. at 371 n.2.

<sup>134</sup> *Id.*

<sup>135</sup> *Begier*, 496 U.S. at 59 (“Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not ‘property of the estate.’”); *Bear Stearns*, 275 B.R. at 198 (“[W]e conclude that the transfers sought to be avoided were not transfers of ‘an interest of [the Fund] in property’ because the federal securities laws do not permit non-brokerage house creditors to recover the transferred assets.”) (second alteration in original).

<sup>136</sup> *Begier*, 496 U.S. at 58 (“Of course, if the debtor transfers property that would not have been available for distribution to his creditors in a bankruptcy proceeding, the policy behind the avoidance power is not implicated.”); *Bear Stearns*, 275 B.R. at 195 (“A transfer of property, even if made with fraudulent intent, that does not leave any creditor in a worse position than he would have been had the transfer never occurred, obviously does not offend the policy behind § 548(a)(1)(A).”).

*Panepinto* is fundamentally different than the interest in property at stake in either *Begier* or *Bear Stearns*.

Consequently, these cases do not provide a firm ground for holding that a transfer of exempt property cannot be fraudulent as to the debtor's creditors. The court would also have to address both the fact that a majority of courts reject the "no harm, no foul" rule when it comes to exempt property, and that the clear language of the Code indicates a congressional intent to capture such transfers.<sup>137</sup> Further, there are also policy reasons for not extending the "no harm, no foul" rule to bankruptcy.

## 2. Problems With the "No Harm, No Foul Rule" in the Bankruptcy Context

Excluding transfers of exempt property from the Code's fraudulent transfer provisions would likely create more problems than it would solve. In *Lasich v. Wickstrom*, the Bankruptcy Court for the Western District of Michigan addressed some of the policy reasons for not adopting the "no harm, no foul" rule.<sup>138</sup> It presented several hypothetical situations concerning application of the "no harm, no foul" rule, one of which does an excellent job highlighting a potentially serious problem and is worth exploring.

In the hypothetical, the court imagined a couple who decide to transfer their home to a third party on the eve of bankruptcy and then elect to take the federal exemptions under 11 U.S.C. § 522(d)(1) and (5).<sup>139</sup> The court then asked whether preventing the trustee from avoiding this transfer under the "no harm, no foul" rule really would result in no harm to the debtors' creditors.<sup>140</sup> The answer, of course, is no. Preventing fraudulent transfer law from reaching this transfer could result in serious harm to creditors. Before seeing exactly why this is the case, it is important to briefly discuss the difference between state and federal bankruptcy exemptions.

Many states, including New York, allow debtors filing for bankruptcy to elect either the federal exemptions or the exemptions available under state law.<sup>141</sup> This option matters for

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<sup>137</sup> Yankowitz, *supra* note 108, at 229-33.

<sup>138</sup> See generally *Lasich v. Wickstrom* (*In re Wickstrom*), 113 B.R. 339 (Bankr. W.D. Mich. 1990).

<sup>139</sup> *Id.* at 348.

<sup>140</sup> *Id.*

<sup>141</sup> See N.Y. DEBT. & CRED. LAW §§ 284-285 (McKinney 2012). New York used to limit debtors to only the exemptions available under state law. DEBT. & CRED. § 284. When this was changed with the passage of § 285, the legislature left § 284 as it was. A



New York residents because the New York homestead exemption is much more generous than the federal homestead exemption.<sup>142</sup> A person who has any significant amount of equity in her home will typically elect the state exemptions in order to protect what is usually her largest asset.<sup>143</sup>

However, when it comes to personal property, the federal exemptions can be much more generous than New York's. Many exemption schemes (including both federal and New York) exempt property based on category and dollar limit.<sup>144</sup> For example, under New York law, a debtor is allowed to exempt a car worth up to \$4,000, professional tools up to \$3,000, jewelry up to \$1,000, etc.<sup>145</sup> Federal law is similar.<sup>146</sup> However, federal law has a provision found in 11 U.S.C. § 522(d)(5) that is often referred to as the "wild card" exemption.<sup>147</sup> This provision allows a debtor to exempt *any* type of personal property up to a limit of \$1,225.<sup>148</sup> This subsection also allows the debtor up to an additional \$11,500 from any unused portion of the federal homestead exemption.<sup>149</sup> Therefore, a debtor who is not claiming a homestead exemption can exempt a total of \$12,725 worth of *any* property the debtor chooses under the federal exemptions. The wild card exemption is in addition to the other categorical exemptions allowed under § 522(d). If a debtor is eligible for all the personal property exemptions under federal law, the total value of exempt property can reach above \$30,000.<sup>150</sup> New York state law has no wild card exemption and also caps personal property exemptions at \$10,000.<sup>151</sup> Thus, if a debtor has both a home and

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person only reading § 284 might conclude that New York law only allows state exemptions, but § 285 states that an individual debtor may choose the federal exemptions instead "[n]otwithstanding any inconsistent provision of law." DEBT. & CRED. § 285.

<sup>142</sup> Compare N.Y. C.P.L.R. § 5206 (McKinney 2012) (allowing \$150,000, \$125,000, or \$75,000, depending on county of residence), with 11 U.S.C. § 522(d)(1) (2013) (allowing \$22,975).

<sup>143</sup> See Brian Powers, Note, *Can You Trust Your Trustee? Expanding Homestead Exemptions to Include Rent-Controlled Leasehold Interests*, 20 AM. BANKR. INST. L. REV. 741, 748 (2012).

<sup>144</sup> See, e.g., 11 U.S.C. § 522(d); N.Y. C.P.L.R. § 5205; MASS. GEN. LAWS 235 § 34 (2014).

<sup>145</sup> N.Y. C.P.L.R. § 5205.

<sup>146</sup> 11 U.S.C. § 522(d) (allowing up to \$12,250 worth of household goods, \$1,550 worth of jewelry, etc.).

<sup>147</sup> See, e.g., *Martin v. Cox* (*In re Martin*), 140 F.3d 806, 807 (8th Cir. 1998) (discussing the wild card exemption).

<sup>148</sup> 11 U.S.C. § 522(d)(5).

<sup>149</sup> *Id.* This is approximately half of the total \$22,975 allowed under § 522(d)(1).

<sup>150</sup> See 11 U.S.C. § 522(d).

<sup>151</sup> N.Y. DEBT. & CRED. LAW § 283 (McKinney 2012).

a significant amount of personal property, the question of which exemption scheme to choose poses a serious dilemma.

Let us return to the hypothetical raised by the *Wickstrom* court and add some more facts. Assume the husband and wife own the home jointly and the husband also owns an expensive automobile currently worth around \$10,000. The home is located in Manhattan, and their equity in the property is under the \$150,000 cap for New York's homestead exemption.<sup>152</sup> If the husband were to file for bankruptcy and elect state exemptions, they could keep the house but would lose the car.<sup>153</sup> However, if the husband transfers the house solely to his wife before he files, he would not have to worry about taking an exemption for the house and could choose the federal exemption scheme. Under the federal exemptions, and without having to worry about a homestead exemption, he could use the wild card provision to fully exempt the car.<sup>154</sup>

Such a transfer on the eve of bankruptcy is a classic fraudulent transfer, but if the "no harm, no foul" rule were in play, the trustee would be unable to do anything about it. The debtor has now benefitted from both the federal and state exemptions at the expense of his creditors. This is a clear case of a transfer designed to hinder, delay, or defraud creditors and fraudulent transfer law should be able to reach it. Extending the "no harm, no foul" rule to this case allows the debtor to protect assets (in this case, an expensive car) that should otherwise be available to his creditors.

Thus, extending the "no harm, no foul" rule to generally cover all transfers of exempt property in bankruptcy is not a viable solution. Not only could it result in serious harm to creditors, such as in the hypothetical above, but a majority of bankruptcy courts have already rejected it.<sup>155</sup> However, the law being used to avoid the transfer in *Panepinto* is based on state

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<sup>152</sup> One hundred fifty thousand dollars is the current maximum exemption for real property used as a primary residence in the county of New York. N.Y. C.P.L.R. § 5206 (McKinney 2012).

<sup>153</sup> New York law caps the exemption value of automobiles at \$4,000. N.Y. C.P.L.R. § 5205(8) (McKinney 2012). The husband would still be able to take advantage of this exemption, but since the car is worth more than the exemption, the trustee would be able to sell the car as part of the estate. *See, e.g., In re Mannone*, 512 B.R. 148, 153-54 (Bankr. E.D.N.Y. 2014) (noting that the trustee may only sell exempt property when the sale will realize value above the exemption limit and that any such value in exempt property sold by the trustee inures to the benefit of the estate). After the sale, the husband would receive \$4,000 (the exemption amount) from the sale proceeds with the remainder going to the estate.

<sup>154</sup> Federal law caps the exemption value of automobiles at \$3,675, but the wild card exemption (assuming no homestead) could easily cover the remaining value. 11 U.S.C. § 522.

<sup>155</sup> *See* Yankowitz, *supra* note 108, at 219.

law, not federal law. Thus, state law precedent could provide grounds for overturning the *Panepinto* decision.

### 3. State Law Precedents

The transfers in *Begier*, *Bear Stearns*, and the *Wickstrom* hypothetical are both subject to either §§ 547 or 548 of the Bankruptcy Code. However, the transfer in *Panepinto* concerned application of § 544 and New York's UFCA. Under § 544, the trustee can avoid any transfer that a valid creditor of the debtor could otherwise avoid under applicable law.<sup>156</sup> In this case, the applicable law is New York's version of the UFCA.

The court in *Panepinto* concluded that New York's version of the UFCA allowed the avoidance of fraudulent conveyances of exempt property. However, there are no New York cases directly on point, and there are some New York cases that even seem to support the "no harm, no foul" rule. There is also a long history of similar holdings from other states. The "no harm, no foul" rule was originally applied in the context of state-level fraudulent transfer law and numerous state courts have held that a transfer of property that is not reachable by creditors due to statutory exemption cannot be fraudulent.<sup>157</sup> While this impressive list of decisions is not

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<sup>156</sup> 11. U.S.C. § 544(b)(1) (2013).

<sup>157</sup> See, e.g., *Flirt v. Kirkpatrick*, 175 So. 2d 755, 758 (Ala. 1965) ("A sale or other disposition of property which is by law exempt from payment of debts cannot be impeached by creditors as fraudulent, since creditors cannot be deemed concerned with property not subject to their demands."); *Montgomery v. Bullock*, 77 P.2d 846, 849 (Cal. 1938) ("[A] creditor is not entitled to complain of the transfer by the debtor of an asset which he could not have reached, had the debtor retained it."); *Sneed v. Davis*, 184 So. 865, 870 (Fla. 1938) ("[T]he corporate stock at the time of the alleged fraudulent conveyance was exempt from sale under execution and, therefore, was property which could not be subjected to the claim of the creditor against the consent of the owner and as to which there could be no conveyance in legal fraud of creditors."); *St. Marie v. Chester B. Brown Co.*, 370 P.2d 195, 197 (Idaho 1962) ("If the property, before transfer, was exempt from execution then a creditor could not reach it and a subsequent transfer would deprive the creditor of no rights."); *Rossow v. Peters*, 115 N.E. 524, 525 (Ill. 1917) ("[A] conveyance of property exempt from the payment of debts is not fraudulent as to creditors."); *Isgrigg v. Pauley*, 47 N.E. 821, 821 (Ind. 1897) ("The whole doctrine of annulling fraudulent conveyances rests upon the ground that the creditor has the right to resort to the property, and where he has no such right it is impossible that a conveyance can be deemed fraudulent."); *Hall Roberts' Son, Inc. v. Plaht*, 114 N.W.2d 548, 549 (Iowa 1962) ("As sometimes said, so far as exempt property is concerned, there are no creditors."); *Saunders v. Graff*, 173 P. 413, 413 (Kan. 1918) ("[T]here is no fraud in withholding exempt property from satisfaction of a debtor's obligations. Creditors are not concerned with any disposition which the owner may make of it."); *Tewmey v. Tewmey's Assignee*, 65 S.W.2d 479, 482 (Ky. 1933) ("[C]reditors cannot be defrauded, hindered, or delayed by the transfer of property which neither at law nor in equity can be made to contribute to the satisfaction of their debts, and hence it is almost universally conceded that property which is by statute exempt from execution cannot be reached by creditors on the ground that it has been fraudulently transferred.");

binding on New York, there is also no precedent to the contrary. Further, at least two older New York cases and one modern case suggest that New York law also excludes exempt property from fraudulent transfer law.

The first of the two older cases is *Zoeller v. Riley*, decided by the New York Court of Appeals in 1885.<sup>158</sup> In a note following the opinion that appears unrelated to the case at hand, the court stated that “the conveyance of property exempt from execution cannot, under any circumstances, be made out to be a fraudulent conveyance.”<sup>159</sup> However, as this is not part of the official opinion and does not relate to the facts of the case, it is dicta at best. Further, this case and the one that follows were decided prior to New York’s adoption of the UFCA and its definition of “conveyance.”

The second older case is *McDonald v. McDonald*,<sup>160</sup> where a defendant against whom a judgment had been obtained transferred all of her property away before the judgment could be satisfied.<sup>161</sup> The plaintiff brought an action to avoid the transfers.<sup>162</sup> The New York Supreme Court held the transfers fraudulent and affirmed judgment for the plaintiff.<sup>163</sup> However, at the end of the opinion, the court

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*Legro v. Lord*, 10 Me. 161, 165 (1833) (“No creditor *can be*, in legal contemplation, defrauded by a mere conveyance made by his debtor of any of his property, which such creditor has no right by law to appropriate or even to touch by any civil process.”); *Mannan v. Merritt*, 93 Mass. 582, 583 (1866) (“A creditor cannot by an attachment impeach the validity of the sale by his debtor of articles which are exempt by law from attachment, upon the ground that such sale was fraudulent as to creditors.”); *Bresnahan v. Nugent*, 52 N.W. 735, 736 (Mich. 1892) (“It has been frequently held that a creditor cannot complain of any disposition which a debtor sees fit to make of exempt property.”); *Sisco v. Paulson*, 45 N.W.2d 385, 387 (Minn. 1950) (“Exempt property is not susceptible of fraudulent alienation, and creditors ordinarily have no right to complain of the disposition made of it, since they cannot be prejudiced thereby or claim that it is a fraud upon them.”); *Chandler v. Welborn*, 294 S.W.2d 801, 805 (Tex. 1956) (“It is well settled that a conveyance of exempt property may not be attacked on the ground that it was made in fraud of creditors.”); *Payson Exch. Sav. Bank v. Tietjen*, 225 P. 598, 600 (Utah 1924) (“A homestead cannot be made the subject of attack by a creditor upon the ground that it was sold or conveyed in fraud of such creditor.”); *Darling v. Ricker*, 35 A. 376, 377 (Vt. 1896) (“There can be no fraud as against creditors in the conveyance of property exempt from attachment.”); *Boynton v. McNeal*, 72 Va. 456, 460 (1879) (“[A] creditor cannot be said to be hindered, or delayed, or prejudiced by a fraudulent conveyance embracing property subject to the homestead, because the debtor is entitled to hold it exempt from the payment of his debts.”); *First Wis. Nat. Bank of Milwaukee v. Roehling*, 272 N.W. 664, 664 (Wis. 1937) (“It has always been the rule in this state that a conveyance of property which is exempt cannot be deemed fraudulent as against creditors.”); *see also* 37 AM. JUR. 2D *Fraudulent Conveyances & Transfers* § 74 (“A debtor’s transfer of an interest in property that is exempt cannot be fraudulent as to creditors.”).

<sup>158</sup> *Zoller v. Riley*, 2 N.E. 388 (N.Y. 1885).

<sup>159</sup> *Id.* at 399.

<sup>160</sup> *McDonald v. McDonald*, 11 N.Y.S. 248 (Gen. Term 1890).

<sup>161</sup> *Id.* at 248.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 249.

discussed a point “suggested by the appellant which should have some further consideration.”<sup>164</sup> The court noted that these transfers included some furniture and other household goods that were exempt property beyond the reach of creditors.<sup>165</sup> The court flatly stated that the creditors of the defendant were not defrauded by the transfer of the exempt property.<sup>166</sup> While the court affirmed the judgment, it modified it to exclude any property subject to exemption from execution.<sup>167</sup>

The more recent case is *Prestige Caterers, Inc. v. Siegel*.<sup>168</sup> In this Appellate Division case from 2011, the defendants hired a catering company but never paid the bill.<sup>169</sup> The catering company sued and obtained a judgment.<sup>170</sup> In the course of enforcing the judgment, the catering company sought to set aside several transfers as fraudulent.<sup>171</sup> The defendants sought to dismiss the complaint arguing that the transfers in question could not be fraudulent because they consisted of social security benefits that were exempt from execution by creditors.<sup>172</sup> The court ultimately denied the motion because the complaint also alleged transfers of funds that were not social security benefits.<sup>173</sup> While the court did not directly address the issue, the implication from the court’s language was that it would have dismissed the complaint had it only alleged transfer of exempt funds.<sup>174</sup>

Looking at these three New York cases, the lack of any New York precedent going the other direction, and the numerous decisions from other jurisdictions, the Bankruptcy Court could potentially rule that, as a matter of state law, a

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Prestige Caterers, Inc. v. Siegel*, 930 N.Y.S.2d 272 (N.Y. App. Div. 2011).

<sup>169</sup> *Id.* at 273.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* (“Although social security benefits are protected from execution, levy, attachment, garnishment, or other legal process, and, therefore, do not constitute assets as defined in Debtor and Creditor Law § 270, the complaint adequately alleges the fraudulent conveyance of other assets and funds which are not exempt from liability for [the alleged] debts.” (alteration in original) (internal quotation marks omitted) (citations omitted)). Note that when discussing the social security benefits, the court states they “do not constitute ‘assets’ as defined in Debtor and Creditor Law § 270.” *Id.* The defendants moved to dismiss the complaint on the grounds that the property transferred was exempt and therefore could not be fraudulent. *Id.* However, as discussed above, a fraudulent conveyance under New York law is not concerned with the transfer of ‘assets’ as defined by § 270; it is concerned with property. See *supra* note 65 and accompanying text. One wonders whether any of the lawyers involved in this case brought this distinction to the attention of the court.

transfer of exempt property cannot be fraudulent. As the *Panepinto* court pointed out, “11 U.S.C. § 544 is different.”<sup>175</sup> It would not be inconsistent with federal court precedent to hold that §§ 547 and 548 can reach a transfer of exempt property and that § 544(b) cannot. Section 544(b) turns on state law and not federal law, so a court would be justified in holding that a transfer of exempt property, while subject to fraudulent transfer law under the provision found in the Code itself, was not subject to state fraudulent transfer law.

The court in *Blanch* endorsed a very similar conclusion.<sup>176</sup> In that case, the court compared §§ 544 and 548, stating that “[t]he trustee’s powers to avoid transfers under each provision are wholly separate and independent of one another.”<sup>177</sup> Specifically, the court noted that “cases decided under the Bankruptcy Code . . . rejected the ‘no harm, no foul’ rule, but that this did not affect the analysis under state law.”<sup>178</sup> Because avoidance under § 548 is based on the Bankruptcy Code and avoidance under § 544(b) is based on state law, there is no inconsistency in holding that they operate differently. What mattered in this case was how Illinois state law would treat the transfers in question.

There are also policy reasons to treat avoidance under § 548 differently from avoidance under § 544(b). Section 548, as the court in *Panepinto* noted, is concerned with the “slide into bankruptcy.”<sup>179</sup> It can only reach transfers that were made within two years of the bankruptcy filing.<sup>180</sup> Most state fraudulent transfer laws reach back further than two years. New York provides for a six-year statute of limitations on fraudulent conveyance actions<sup>181</sup> and most UFTA jurisdictions apply a four-year statute of limitations.<sup>182</sup> A transfer, regardless of actual intent, made immediately before filing for bankruptcy is inherently more suspicious than one made several years before filing. Presumably, a debtor is much more aware of financial distress closer to filing and should be more careful in the disposition of his assets.

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<sup>175</sup> *In re Panepinto*, 487 B.R. 370, 371 n.2 (Bankr. W.D.N.Y. 2013).

<sup>176</sup> *In re Blanch*, Nos. 97-82652, 98-8011, 1998 WL 34065289 at \*2 (Bankr. C.D. Ill. Sept. 11, 1998).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Panepinto*, 487 B.R. at 371 n.2.

<sup>180</sup> 11 U.S.C. § 548(a)(1) (2013).

<sup>181</sup> *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35 (2d Cir. 1993) (holding that constructive fraud actions under New York law are subject to six-year statute of limitations).

<sup>182</sup> *See, e.g.*, 740 ILL. COMP. STAT. 160/10 (2014); MASS. GEN. LAWS ch. 109A § 10 (2014); UNIF. FRAUDULENT TRANSFER ACT § 9 (1984).

One justification for constructive fraud provisions is to do away with ambiguous questions of intent. As previously noted, actual intent to hinder, delay, or defraud creditors is rarely susceptible to direct proof. In devising the objective markers that make a transfer fraudulent without regard to the intent of the transferor, the drafters of the UFCA knew that they would likely sweep up some transfers that were made without any intent to defraud creditors.<sup>183</sup> This was considered acceptable when balancing out the policy goals of the statute.<sup>184</sup>

In the same spirit, applying such provisions with more force immediately before the bankruptcy makes sense. It is much more likely that a transfer right before filing for bankruptcy will harm creditors. Zealously going after potentially fraudulent transfers made in a short time period before bankruptcy fits with the goals of the system. However, it also makes sense to be a bit more forgiving when it comes to transfers made as long ago as six years prior to a bankruptcy filing, particularly when the result could be the debtor losing a home that her creditors never had any legal right to in the first place. If a debtor tries to engage in the sort of subterfuge that hinders, delays, or defrauds creditors she should not be rewarded. But that does not mean that a creditor should enjoy advantages it was never entitled to. The result would be to force a family out of their home because a completely innocent transfer ran afoul of an archaic law.

Despite both the case history and the sound policy reasons for holding that a transfer of exempt assets is not subject to state fraudulent transfer law, the fact remains that the plain language of the UFCA in New York, combined with the Bankruptcy Code, seem to compel this result. New York law defines “conveyance” as any transfer of property without respect to exemption.<sup>185</sup> It is unclear whether a New York court would rule that the transfer in *Panepinto* was fraudulent. The best solution is for New York to join the rest of the country and adopt the UFTA.

### *B. Solving the Exemption Problem with the UFTA*

The Conference is currently considering amendments to the UFTA (now known as the Uniform Voidable Transactions

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<sup>183</sup> Baird & Jackson, *supra* note 15, at 831-32.

<sup>184</sup> See Kennedy, *Involuntary*, *supra* note 42, at 534-35 (discussing how the drafters of the UFCA wanted to eliminate questions of intent in order to improve creditors' remedies).

<sup>185</sup> N.Y. DEBT. & CRED LAW § 270 (McKinney 2012).

Act (UVTA)).<sup>186</sup> The release of the UVTA is an excellent opportunity for New York to join the other 43 states that have already adopted some version of the UFTA.<sup>187</sup>

The failure of New York to adopt a version of the UFTA to date threatens the state exemption system. The exemptions are there for a reason. The property set aside as exempt from creditors is the property the state has decided is essential to everyday life. Stripping debtors of this property creates social costs that far outweigh the costs of leaving some debt uncollected. The goal should be to strike a balance between ensuring creditors are paid, which is essential to a healthy credit system, and preventing debtors from becoming wards of the state. Bankruptcy goes hand-in-hand with this system to prevent debtors from falling into a cycle of debt they can never escape.

Society and the economy as a whole are better off when people can live normal lives and make positive contributions to the economy. It is also important for the economy to maintain a healthy credit system, and, to do that, we must have procedures in place to ensure creditors are paid.<sup>188</sup> But this can also go too far. Allowing creditors to take everything debtors own risks putting debtors in a position where they have no alternative but to live on public assistance.<sup>189</sup> This in turn raises costs for the rest of society.

Both goals are important. Proper recovery mechanisms for creditors in the case of default encourage lenders to make more loans.<sup>190</sup> Access to credit is not only essential to the modern economy,<sup>191</sup> it can also be a key factor in reducing poverty and promoting economic development.<sup>192</sup> However, it is well-settled “that exemptions in bankruptcy are to be liberally construed in order to afford the honest debtor a fresh start.”<sup>193</sup> The debtor’s fresh start is important because not only does it help the debtor and her family, it also provides “benefits [to]

<sup>186</sup> NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS, UNIF. VOIDABLE TRANSACTIONS ACT (FORMERLY UNIF. FRAUDULENT TRANSFER ACT) (formerly THE UNIF. FRAUDULENT TRANSFER ACT) (as amended in 2014), *available at* [http://www.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2014AM\\_AUVTA\\_Draft\\_As%20approved.pdf](http://www.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2014AM_AUVTA_Draft_As%20approved.pdf).

<sup>187</sup> See UNIF. FRAUDULENT TRANSFER ACT, references & annots (2006) (outlining the UNIF. FRAUDULENT TRANSFER ACT, adopted in 43 jurisdictions.).

<sup>188</sup> See Kennedy, *Involuntary*, *supra* note 42, at 534.

<sup>189</sup> *Bankruptcy Exemptions*, *supra* note 22, at 1459.

<sup>190</sup> Luke Shimek & Rajdeep Sengupta, *Access to Credit*, ECONOMIC SYNOPSIS no. 4, 2007, *available at* <https://research.stlouisfed.org/publications/es/07/ES0704.pdf>.

<sup>191</sup> Jacques Sapir, *Credit, Indebtedness and Economic Growth*, RUSSEUROPE, (Sept. 1, 2013, 10:29 PM), <http://russeurope.hypotheses.org/1500>.

<sup>192</sup> Shimek & Sengupta, *supra* note 190.

<sup>193</sup> *In re Abbott*, 408 B.R. 903, 911 (Bankr. S.D. Fla. 2009).



the rest of society by reviving the debtor's incentive to work and participate productively in the economy."<sup>194</sup>

Thus, it is important to strike a balance between ensuring creditors are paid and preventing debtors from becoming wards of the state. We need a system that allows creditors a sufficient recovery to keep credit flowing at reasonable rates while at the same time ensuring that debtors have enough protections to recover if they find themselves unable to pay their debts. The system of exemptions is a key part of that balance. If we then allow the law to undermine and frustrate those exemptions unnecessarily, we risk upsetting the balance and causing harm to the economy.

There is also a moral dimension to limiting how much creditors should be allowed to take. As a society, we do not want to see debtors stripped of everything they own and forced onto the street. Creditors should not be allowed to literally strip a debtor naked and take everything, from the family house to the debtor's books and even pets. The exemption laws in this country protect the things that are essential for a person to live with dignity in modern society. We should not allow this system to be undermined by a technical definition of the word "conveyance."

There is also no policy reason to hold exempt property subject to state fraudulent transfer law. The purpose of the law is to recover property that can be used to pay creditors. The exemption scheme is specifically designed to put certain property beyond the reach of creditors. Allowing fraudulent transfer law to alter the balance clearly intended by the legislature undermines the policy goals of the exemption statutes. Simply put, *not* updating the law is against the policy of the state.

That is not to say no potential issues exist if New York were to adopt the UFTA or otherwise protect transfers of exempt property from fraudulent transfer law. If fraudulent transfer law could never reach exempt assets, it would be possible for someone who owns a house to transfer that house to a third party for no consideration, then use all his remaining assets to purchase a new, exempt house. When he files for bankruptcy, he will have no non-exempt assets, and the trustee will be unable to avoid the transfers. Here, we see a debtor exploiting the rules to hinder, delay, or defraud creditors. However, there are several solutions to this problem. First, in order to take

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<sup>194</sup> Marianne B. Culhane & Michaela M. White, *But Can She Keep the Car? Some Thoughts on Collateral Retention in Consumer Chapter 7 Cases*, 7 FORDHAM J. CORP. & FIN. L. 471, 473 (2002).

advantage of the UFTA, he would have to have transferred the house more than two years before filing for bankruptcy. Otherwise, the transfer could simply be avoided under 11 U.S.C. § 548 which reaches transfers of exempt property.<sup>195</sup>

Second, the bankruptcy courts have always retained the ability to dismiss cases when they find the debtor has abused the Bankruptcy Code. Under 11 U.S.C. § 707(b)(3)(A), the bankruptcy court can dismiss the case if it finds the petition was not filed in good faith.<sup>196</sup> It is not hard to imagine a bankruptcy court finding that the actions of our hypothetical debtor in exploiting the exemption system to prevent substantial assets from becoming available to his creditors constitutes bad faith and abuse of the system.

Third, if these protections are not enough for the legislature, it can always add additional protections as part of the adoption of the UVTA. An easy example would be to generally exclude transfers of exempt property from the constructive fraud provisions while specifically *including* exempt property in cases where there is evidence of actual fraud. All the legislature would need to do is set out a separate section making it clear that transfers made with actual intent to hinder, delay, or defraud creditors are voidable regardless of any exemptions that may apply to the property transferred.

Even if the New York legislature chooses not to adopt the UVTA, there is still a simple fix available: they can redefine “conveyance” to exclude exempt property. This would require simply changing the word “property” to “asset” in the definition of “conveyance” found in NYDCL section 270. The current law already defines “asset” to exclude exempt property.<sup>197</sup> This change will promote the policy objectives of the exemption statutes, but will not undermine any current policy objectives of fraudulent transfer law.

## CONCLUSION

For the debtor in *Panepinto*, this particular saga is over as the court confirmed the debtor’s plan.<sup>198</sup> But the underlying issue—whether transfers of exempt assets are subject to

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<sup>195</sup> See *supra* note 136 and accompanying text.

<sup>196</sup> 11 U.S.C. § 707(b)(3)(A) (2013).

<sup>197</sup> N.Y. DEBT. & CRED. LAW § 270 (McKinney 2012).

<sup>198</sup> The court in *Panepinto* confirmed the Debtor’s plan on Dec. 30, 2013. *Panepinto* Docket, *supra* note 74. A further review of the docket indicates that the specific controversy with the main creditor has been settled. *Id.* The specific details are not currently available, but no fraudulent transfer adversary proceeding was filed. *Id.*

fraudulent transfer law in New York—remains unresolved. Now that a bankruptcy court has opened the door to challenging this type of transfer, trustees in future cases could potentially sell an entirely exempt homestead out from under an innocent debtor. Trustees are not in the business of kicking debtors out of their homes, but they have a fiduciary duty, imposed by law, to get the best return on a debtor's assets for the benefit of the estate. The only way to ensure that this tragic scenario does not occur at some point in the future is to change the law.

Adopting the UVTA would not be inconsistent with the current fraudulent conveyance law in New York. There is no indication the legislature intended to expose exempt property to fraudulent transfer law. If the dispute in *Panepinto* were outside bankruptcy, then, even if the transfer was avoided, the house would still be exempt because it would return to the debtor under the homestead exemption. If New York had intended for exempt property that was fraudulently transferred to be available to creditors, there would be some mechanism in state law to strip the exemption after avoidance. The lack of such a provision creates the inference that the legislature did not intend for exempt property to lose its exempt status because it was part of a constructively fraudulent transfer.

To remedy this situation and ensure that the exemption system functions as it is supposed to, New York should take the upcoming amendments to the UFTA as an opportunity to update its fraudulent transfer law and join almost every other state in upholding the integrity of exempt property. If the state declines to do this, it should, at a minimum, change the definition of “conveyance” in the fraudulent transfer statutes to ensure that the exemption laws work as they should: to protect property essential to everyday life.

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# “I Know My Client Would Never Hurt His Daughter, But How Can I Prove It?”

## A LAWYER’S GUIDE TO DEFENDING AGAINST CHILD SEXUAL ASSAULT ACCOMMODATION SYNDROME EVIDENCE

Mr. Smith<sup>1</sup> settles into work on a Monday morning, completely content after sharing a wonderful weekend with his daughter Jane.<sup>2</sup> Although his divorce might be frustrating, he could not be happier that he has custody of his eight-year-old daughter on the weekend. Just then, his phone rings; his divorce attorney is on the line. Apparently, his soon-to-be ex-wife has called child protective services and has accused him of sexually abusing his daughter during their last weekend visit. Shocked, he does not respond. The attorney continues, saying, “Your daughter told a caseworker, ‘[Daddy] hurt my private place with his private place.’”<sup>3</sup> Defeated, Mr. Smith hangs up the phone and his mind begins to race with all sorts of

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<sup>1</sup> This note will refer to the accuser as female and the accused as male, as these gender choices represent the more common way these issues arise—when a mother accuses her soon-to-be-ex-husband of sexually abusing their child. See RICHARD A. GARDNER, M.D., TRUE AND FALSE ACCUSATIONS OF CHILD SEX ABUSE 183 (1992) (“Because mothers, much more commonly than fathers, are likely to initiate such accusations, I will refer to the accuser as the mother.”). Please note that the issues presented in this note could apply in situations involving both heterosexual and homosexual couples, and the parents could be of either gender. Allegations of sexual abuse of a child in custody and visitation cases can also be made against step-parents and other cohabitants of the biological parents.

<sup>2</sup> This note will refer to the child victim as female because Dr. Summit, in his paper, *The Child Sexual Abuse Accommodation Syndrome*, refers to the child as female. See Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 180 (1983) (internal citations omitted) (“In the current state of the art most of the victims available for study are young females molested by adult males entrusted with their care.”). This is not to ignore the fact that both young girls and boys are victims of sexual abuse. *Child Sexual Abuse Statistics*, NAT’L CTR. OF VICTIMS OF CRIME, <http://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics> (last visited Jan. 30, 2015) (“1 in 5 girls and 1 in 20 boys is a victim of child sexual abuse.”).

<sup>3</sup> TERENCE W. CAMPBELL, SMOKE AND MIRRORS: THE DEVASTATING EFFECT OF FALSE SEXUAL ABUSE CLAIMS 31 (1998) (internal quotation marks omitted).

questions. How could he possibly defend himself? Will he ever be able to spend time with his daughter again? Two days later Mr. Smith receives another phone call from his attorney—Jane has recanted her allegations, but her mother intends to use the allegations as a basis for sole custody. Now what?

## INTRODUCTION

Allegations of child sexual abuse<sup>4</sup> are often made by one parent against another during divorce proceedings, especially during custody disputes.<sup>5</sup> In fact, these allegations are “widespread”<sup>6</sup> and parents make these allegations in about 2% of cases.<sup>7</sup> Although there is much debate over the veracity of sexual abuse allegations made during custody disputes, studies show that allegations made during divorce disputes are often unfounded.<sup>8</sup> Most of these allegations are “reported following a

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<sup>4</sup> There is no one definition of child sexual abuse. “Definitions vary considerably and legal definitions found in state laws vary from state to state . . . However, most experts agree on certain elements of the definition: exploitation of the child; use of coercion, gentle though it may be; and some level of gratification gained by the adult.” KAREN KINNEAR, *CHILDHOOD SEXUAL ABUSE: A REFERENCE HANDBOOK* 2 (1995). The Child Abuse Prevention and Treatment Act first passed in 1974 defines “sexual abuse” as:

(A) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or (B) the rape, and in cases of caretaker or inter-familial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.

42 U.S.C. § 5106g(4)(A)-(B) (2012).

<sup>5</sup> MODERN FAMILY LAW 854 (Weisberg & Appleton eds., 4th ed. 2010).

<sup>6</sup> GARDNER, *supra* note 1, at 300 (“Because a sex-abuse accusation is an extremely powerful vengeance and exclusionary maneuver, such accusations have become increasingly widespread in recent years.”); MELVIN G. GOLDZBAND, *CUSTODY CASES AND EXPERT WITNESSES: A MANUAL FOR ATTORNEYS* 33 (2d ed. 1988) (“There is a widespread, currently flagrant, nationwide epidemic of allegations of sexual abuse committed against a child by one contesting parent in custody or visitation battles.”).

<sup>7</sup> MODERN FAMILY LAW, *supra* note 5, at 854 (citing Kathleen Coulborn Faller, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 429, 430 (2000)); see Catherine Paquette, Note, *Handling Sexual Abuse Allegations in Child Custody Cases*, 25 NEW ENG. L. REV. 1415, 1415 n.2 (1991) (citing Thoennes & Pearson, *Summary of Findings from the Sexual Abuse Allegations Project*, in *SEXUAL ABUSE ALLEGATIONS IN DIVORCE CASES* 135, 135 (1988)) (“In most states, two to ten percent of all family court cases involving custody or visitation include an allegation of sexual abuse.”).

<sup>8</sup> See *State v. Herrera*, 307 P.3d 103, 117-18 (Ariz. Ct. App. 2013) (“Wendy Button, a forensic interviewer, testified for the state as an expert on the behavior and characteristics of child sexual abuse victims. On direct examination, Button stated that false allegations occur most commonly when the purported victims are either ‘younger children whose parents are involved in a high-conflict divorce or custody dispute’ or ‘adolescent females.’”); see also GARDNER, *supra* note 1, at xxv (“There is no question

visit with the non-custodial parent.”<sup>9</sup> These false allegations are often “invented by mothers to stop fathers from seeing their children.”<sup>10</sup> Many of these women know that an allegation of sexual abuse is one method of “completely shutting [their] husbands out of the child’s life.”<sup>11</sup>

Children may also be responsible for false allegations of sexual abuse.<sup>12</sup> They may purposefully make false allegations to “take control over the custody determination by alleging sexual abuse by the parent with whom the child does not want to live.”<sup>13</sup> Other times, children eager to please an adult “unintentionally”<sup>14</sup> accuse a parent of sexual abuse in response to suggestive questioning by the other parent.<sup>15</sup>

Once an allegation is made to the family court, the judge must consider it, which may result in the accused’s complete loss of custody or even a loss of visitation time with his child.<sup>16</sup> In many of these cases that involve such allegations, expert testimony of Child Sexual Abuse Accommodation Syndrome (CSAAS) is introduced against the accused parent.<sup>17</sup> CSAAS is a nondiagnostic tool used “to explain how children who

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that many accusations of child sex abuse are true . . . [h]owever, there is no question, as well, that many of the accusations are false, especially in child custody disputes (where the vengeance element and the opportunity for exclusion of a hated spouse is operative”.); GOLDZBAND, *supra* note 6, at 33 (“[M]any allegations are patently false and based upon manipulative attempts to prevent custody by the other parent, or upon anxiety-provoked misconceptions by battling parents.”); O’Donohue, W. et al., *Analyzing Child Sexual Abuse Allegations*, 13 FORENSIC PSYCHOL. PRAC. 296, 301 (2004); Paquette, *supra* note 7, at 1420 (internal citation omitted) (“[F]alse allegations . . . occur, most typically in divorce or custody cases.”); *but see 10 Custody Myths and How to Counter Them*, ABA COMMISSION ON DOMESTIC VIOLENCE, (Quarterly E-Newsletter, Vol. 4), July 2006, *available at* [http://www.americanbar.org/content/dam/aba/publishing/cdv\\_enewsletter/custodymythsandcounter.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/cdv_enewsletter/custodymythsandcounter.authcheckdam.pdf) (internal citation omitted) (“[T]he majority of allegations are substantiated . . .”).

<sup>9</sup> Paquette, *supra* note 7, at 1420 (internal citation omitted).

<sup>10</sup> Harriet Alexander, *False Abuse Claims are the New Court Weapon*, *Retiring Judge Says*, SYDNEY MORNING HERALD (July 6, 2013), <http://www.smh.com.au/national/false-abuse-claims-are-the-new-court-weapon-retiring-judge-says-20130705-2phao.html>; *see* Paquette, *supra* note 7, at 1420 (internal citations omitted) (“In some of these instances, the parents may have created the sexual abuse occurrence in order to terminate custody rights or prevent visitation.”); *but see 10 Custody Myths and How to Counter Them*, *supra* note 8, at 2 (“Among false allegations, fathers are far more likely than mothers to make intentionally false accusations . . .” (internal citations omitted)).

<sup>11</sup> Alexander, *supra* note 10.

<sup>12</sup> Paquette, *supra* note 7, at 1421 (internal citation omitted).

<sup>13</sup> *Id.* (internal citation omitted) (internal quotation mark omitted).

<sup>14</sup> *Id.* (internal citation omitted).

<sup>15</sup> O’Donohue, W., et al., *supra* note 8, at 302 (internal citation omitted).

<sup>16</sup> Alexander, *supra* note 10.

<sup>17</sup> *State v. Davis*, 581 N.E.2d 604, 609 (Ohio 1989) (warning that the term “syndrome” may mislead the fact-finder: “[T]he term ‘syndrome’ is a misnomer since symptoms or traits cannot by themselves be used as a test for sexual abuse, for the simple reason that CSAAS is not probative of sexual abuse”).

are abused react to their maltreatment.”<sup>18</sup> Particularly, CSAAS is used to explain why children may delay disclosing their abuse and why they may recant their allegations of abuse.<sup>19</sup> CSAAS evidence however, has many flaws. This note seeks to enlighten attorneys who represent parents accused of abusing their children to the weaknesses of CSAAS evidence, and propose meaningful steps to take when representing their clients in custody hearings in family court.<sup>20</sup> Part I of this note discusses the history of CSAAS, the reasons for the syndrome, and examines each of the elements of the syndrome. Part II explains how, and for what purpose, CSAAS evidence is admitted into court. Part III presents a survey of the nation’s major cases involving CSAAS evidence. Part IV highlights the weaknesses of CSAAS testimony and recommends sample objections attorneys can make when arguing in favor of their motion to exclude the expert testimony. Finally, Part V recommends sample questions and answers attorneys for the clients accused of sexually abusing their child can use when examining expert witnesses to highlight the weaknesses of CSAAS testimony, even if the judge permits the testimony into evidence.

## I. CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

Based on child victim’s reports and complaints from “sexual abuse treatment centers,”<sup>21</sup> CSAAS was first identified in 1983 by Dr. Roland Summit in his article, *The Child Sexual Abuse Accommodation Syndrome*.<sup>22</sup> Not only does CSAAS

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<sup>18</sup> John E. B. Myers, *Special Evidentiary Issues*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 305, 309 (Ventrell & Duquette eds., 2005).

<sup>19</sup> State v. J.Q., 617 A.2d 1196, 1209 (N.J. 1993) (internal citations omitted).

<sup>20</sup> This note relies on the term “accused” to describe the parent against whom allegations of child sexual abuse are made. The term “defendant” is only appropriate when the state decides to bring criminal charges (and hold a jury trial) against the accused. If the state does not bring criminal charges against the accused, the Family Court judge will make all determinations about the allegations. See generally Jennifer L. Thompson, *Allegations of Criminal Child Abuse in Divorce Cases*, 28 A.B.A. SEC. PUB. GPSOLO 6 (2011) (explaining the difference between criminal trials that occur after allegations have been made in Family Court and the custody hearings taking place).

<sup>21</sup> Susan Romer, *Child Sexual Abuse in Custody and Visitation Disputes: Problems, Progress, and Prospects*, 20 GOLDEN GATE U. L. REV. 647, 658 (1990); see Kenneth J. Weiss & Julia Curcio Alexander, *Sex, Lies, and Statistics: Inferences from the Child Sexual Abuse Accommodation Syndrome*, 41 J. AM. ACAD. PSYCHIATRY L. 412, 414 (2013) (“Summit’s [work was based on] statistically supported assumptions emerging from clinical work; four years of testing in the author’s practice; strong endorsements from victims, offenders, and family members; and consensus derived from hundreds of training symposia.”).

<sup>22</sup> Summit, *supra* note 2, at 177.

“describe how children react (accommodate) to ongoing sexual abuse,”<sup>23</sup> but it also helps to identify children who may be suffering from the effects of sexual abuse in order to provide them with the treatment they need.<sup>24</sup> Essentially, Dr. “Summit’s goal was to enhance our understanding of victims, to give them a voice, and to provide a context for understanding their coping behavior within the family and systems of child protection and criminal justice.”<sup>25</sup>

CSAAS is a nondiagnostic tool used solely “to explain how children who are abused react to their maltreatment;” but CSAAS is not used “to prove that abuse occurred.”<sup>26</sup> To accomplish its goal, CSAAS identifies common characteristics and their presence in abused children.<sup>27</sup> The presence of these common characteristics in a child, however, is not evidence of whether a child has been sexually abused.<sup>28</sup> In fact, because “[t]he accommodation syndrome is neither an illness nor a diagnosis,” it cannot “measure whether or not a child has been sexually abused.”<sup>29</sup> Therefore, because CSAAS “does not detect sexual abuse,”<sup>30</sup> it “is not probative of sexual abuse.”<sup>31</sup> Instead “the syndrome assumes that abuse has occurred and helps explain the child’s reaction to it.”<sup>32</sup> For example, a child may tell a social worker one day that her father sexually abused her, but may tell her social worker the next day that her father has never touched her inappropriately. CSAAS assumes that the child was in fact sexually assaulted and explains why she may have recanted her

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<sup>23</sup> Myers, *supra* note 18, at 308 (internal citation omitted).

<sup>24</sup> See Romer, *supra* note 21 (internal citation omitted) (discussing the field of child sexual assault and the role it plays in custody and visitation disputes).

<sup>25</sup> Weiss & Alexander, *supra* note 21, at 413.

<sup>26</sup> Myers, *supra* note 18; see State v. Davis, 581 N.E.2d 604, 609 (Ohio 1989) (“In effect, CSAAS does not diagnose or detect sexual abuse, but instead, *assumes* the presence of such abuse and seeks to explain the child’s reaction to it.”).

<sup>27</sup> Davis, 581 N.E.2d at 609 (internal citation omitted); Summit, *supra* note 3 (explaining that CSAAS evidence was intended to present “a common denominator of the most frequently observed victim behaviors”).

<sup>28</sup> Davis, 581 N.E.2d at 609 (internal citation omitted).

<sup>29</sup> Myers, *supra* note 18 (quoting Mary B. Meinig, *Profile of Roland Summit*, 1 VIOLENCE UPDATE 6, 6 (1991)); Hall v. State, 611 So. 2d 915, 919 (Miss. 1992) (“[CSAAS] was not meant to be used as a diagnostic device to show that abuse had, in fact, occurred.”).

<sup>30</sup> Steward v. State, 652 N.E.2d 490 (Ind. 1995) (citing John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 67 (1989)); Myers, *supra* note 18, at 318.

<sup>31</sup> Davis, 581 N.E.2d at 609.

<sup>32</sup> Myers, *supra* note 18, at 318; see Steward, 652 N.E.2d at 490 (“[T]he syndrome was designed for purposes of treating child victims and offering them more effective assistance within the family and within the systems of child protection and criminal justice . . . and helps to explain reactions—such as recanting or delayed reporting—of children assumed to have experienced abuse.”) (internal citations and quotations omitted).



story.<sup>33</sup> CSAAS evidence, however, does not confirm that she has been assaulted because she has recanted her story.<sup>34</sup> Thus, a suggestion that a child was abused because children who have been sexually abused often recant their stories “is an improper usage of Dr. Summit’s theory.”<sup>35</sup>

Dr. Summit “classified the typical reactions of sexually abused children into five categories” known as the five elements of CSAAS: “(1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted, and unconvincing disclosure, and (5) retraction” or recantation.<sup>36</sup> It is imperative for attorneys defending those accused of sexual abuse of a child to understand the elements of CSAAS in preparing a defense against it. For example, questions about the child’s inconsistent statements are generally asked by the accused’s attorney on cross examination of the accusing parent, social worker, or the independent child psychologist appointed by the court in a sexual abuse case.<sup>37</sup> The accusing parent’s attorney, however, will most likely utilize an expert witness to testify about CSAAS and explain why the child has made inconsistent statements.<sup>38</sup> Consequently, attorneys defending alleged abusers must understand the elements of CSAAS in order to prepare the best defense for their clients.

#### A. *Secrecy*

The first element of CSAAS, secrecy, is a “basic childhood vulnerability” and a “precondition to the occurrence of sexual abuse” of a child.<sup>39</sup> “Preconditions are understood to set the stage for the initiation and continuation of sexual

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<sup>33</sup> See Davis, 581 N.E.2d at 609; Summit, *supra* note 2, at 190.

<sup>34</sup> See Davis, 581 N.E.2d at 609 (“In effect, CSAAS does not diagnose or detect sexual abuse, but instead, *assumes* the presence of such abuse and seeks to explain the child’s reaction to it.”).

<sup>35</sup> Hall v. State, 611 So. 2d 915, 919 (Miss. 1992).

<sup>36</sup> Elaine R. Cacciola, *The Admissibility of Expert Testimony in Inframily Child Sexual Abuse Cases*, 34 UCLA L. REV. 175, 184 (1986).

<sup>37</sup> See JEAN GRAM HALL & DOUGLAS F. MARTIN, CHILD ABUSE: PROCEDURE AND EVIDENCE 186 (1993) (“Under cross-examination, a witness may be asked about statements he made prior to his appearance in the court, which are inconsistent with his present evidence. If he admits that he made a previous statement which is inconsistent with the evidence he is now giving, that statement is admissible to discredit the truth of his evidence.”).

<sup>38</sup> Myers, *supra* note 18, at 318 (“Expert testimony on CSAAS is admissible to rehabilitate a child’s credibility following impeachment focused on delayed reporting, inconsistency, or recantation. Such rehabilitation is appropriate because jurors may not understand that delayed reporting, recantation, and inconsistency are relatively common among sexually abused children.”).

<sup>39</sup> Summit, *supra* note 2 at 181.

abuse.”<sup>40</sup> The secrecy aspect “is an intrinsic characteristic” because child sexual abuse generally occurs when the offender is secluded with the child.<sup>41</sup>

For obvious reasons, the abuser must ensure that the illicit encounters with the child are kept completely secret from society, especially from other adults and the police. In order to ensure secrecy, the abuser uses intimidation tactics to scare the child into silence.<sup>42</sup> For example, the abuser may say, “If you tell anyone our secret, I will hurt you.”<sup>43</sup> These threats “make[] it clear to the child that this is something bad and dangerous” so the secrecy acts as “both the source of fear and the promise of safety” for the child.<sup>44</sup> Because the child is lead to believe that she is doing something bad, the child believes her abuser when he says, “Everything will be all right if you just don’t tell.”<sup>45</sup>

The secrecy element of child sexual abuse stories is extremely common; the “majority of the victims in [Summit’s] surveys had never told anyone” about their childhood abuse.<sup>46</sup> This plays out in practice as many abused children keep their abuse a secret because they are afraid of the repercussions.<sup>47</sup> Many fear that they would face blame for their actions, that their parents would not believe them, or that their parents would be upset with them for not immediately disclosing the abuse to them.<sup>48</sup>

### *B. Helplessness*

Helplessness is the second “childhood vulnerability” that serves as a “precondition to the occurrence of sexual abuse” of a child, especially when the abuse comes from a familiar (non-stranger) adult.<sup>49</sup> “Helplessness . . . refers to the power imbalance between children and adult perpetrators and is a factor in both the initiation of sexual assault and maintenance of secrecy.”<sup>50</sup> Children do not share equal power with adults, both physically and socially.<sup>51</sup> Because the abuser

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<sup>40</sup> Weiss & Alexander, *supra* note 21, at 413.

<sup>41</sup> *Id.*

<sup>42</sup> Summit, *supra* note 2 at 181.

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Summit, *supra* note 2 at 182.

<sup>47</sup> *Id.* (internal citation omitted).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 177.

<sup>50</sup> Weiss & Alexander, *supra* note 21, at 413.

<sup>51</sup> Summit, *supra* note 2, at 182.

is often someone the child loves and trusts, the power imbalance increases and the child's helplessness is further underscored.<sup>52</sup> The imbalance of power intensifies when the abuser is a parent because the parent is "in control of material resources," can influence other people important to the child, and has decision-making power over the child.<sup>53</sup> Because of this imbalance of power, the majority of victims are forced to endure their abuse.<sup>54</sup> Unlike adult victims who can fight back, scream for help, or try to escape, children feel helpless against this adult figure against whom they are physically powerless.<sup>55</sup>

### C. *Entrapment and Accommodation*

Entrapment and accommodation is the first of three characteristics that are contingent upon the abuse having taken place.<sup>56</sup> Summit argues that until these helpless children break the secret and seek assistance from another adult or the police, the child is forced "to learn to accept the situation and to survive."<sup>57</sup> This means a "healthy, normal, emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse."<sup>58</sup>

Because children have a hard time differentiating between a trusted adult who is caring and a trusted adult who is callous, child victims think they have "provoked the painful encounters" and believe that by accommodating the sexual demands of their abusers and keeping the secret, they "can earn love and acceptance" from their abusers whom they are already wired to trust.<sup>59</sup> Because child victims feel they must protect their abusive parents—from getting caught, going to jail, and sending them and their siblings to foster care—they

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<sup>52</sup> *Id.*

<sup>53</sup> Weiss & Alexander, *supra* note 21, at 413.

<sup>54</sup> Summit, *supra* note 2, at 183.

<sup>55</sup> *Id.* at 182. Summit points out the common reasons why children do not speak out against trusted adults who are sexually abusing them. He specifically condemns the work of judges and attorneys who question children who did not report their abuse. He writes, "It is sad to hear children attacked by attorneys and discredited by juries because they claimed to be molested yet admitted they had made no protest or outcry." *Id.* at 183. While it is essential for the attorney of an accused parent to cross-examine a child to discover why the child did not report the abuse, this author acknowledges that the child is further attacked both by these questions in the court room, and later on. It is for this reason that this note provides ways to use CSAAS evidence to produce an acquittal, without the need for further harm to the child.

<sup>56</sup> *Id.* at 177.

<sup>57</sup> *Id.* at 184.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

must find a way to escape reality and deal with the abuse.<sup>60</sup> Some children may develop an imaginary friend, create multiple personalities, or disassociate themselves from the body being abused.<sup>61</sup>

If child victims cannot accommodate the abuse as described, they will express their helplessness and rage in other ways.<sup>62</sup> For example, these emotions “often lead[] to self-destruction and reinforcement of self-hate[,] self-mutilation, suicidal behavior, promiscuous sexual activity and repeated runaways . . . .”<sup>63</sup> Daughters being sexually abused by their fathers will seek gifts and privileges for being exploited.<sup>64</sup> Abused children will also express their emotions by fighting with their parents (especially the mother whom the child blames for being abused and allowing the abuse to continue).<sup>65</sup> “The failure of the mother-daughter bond reinforces the young woman’s distrust of herself as a female and makes her all the more dependent on the pathetic hope of gaining acceptance and protection with an abusive male.”<sup>66</sup> Many victims also turn to substance abuse to help them escape the realities of their abuse or to experience the emotions that they are suppressing.<sup>67</sup>

#### *D. Delayed, Conflicted, and Unconvincing Disclosure*

The majority of children who are sexually abused never disclose their painful experiences.<sup>68</sup> As the child grows up, an abusive father may become jealous of his child’s relationships, and may try to control the child’s involvement with others.<sup>69</sup> Particularly with young girls, to cope, the children often rebel against their fathers, as described above.<sup>70</sup> As a result, they may face punishment by their parents.<sup>71</sup> In a typical case, an abused girl may become enraged after a particularly “punishing family fight and a belittling showdown of authority by the father” and may tell her secret to the police.<sup>72</sup> Police

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<sup>60</sup> *Id.* at 185.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 185-86 (internal citation omitted).

<sup>68</sup> *Id.* at 186 (internal citations omitted).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

authorities, however, may assume her claims are fictional, especially in cases where she may have waited years to disclose her story.<sup>73</sup> The police may also “assume she has invented the story in retaliation against the father’s attempts to achieve reasonable control and discipline;” the more intense the punishment is, the more likely they are to assume she is trying to “falsely incriminat[e] her father.”<sup>74</sup>

Because all abused children accommodate their abuse differently, they may face diverse disclosure difficulties.<sup>75</sup> For example, some children are able to completely hide their abuse by excelling in school or achieving popularity; they are “eager to please both teachers and peers.”<sup>76</sup> These children often face skeptical adults who are unable to believe their disclosures of abuse because the children have excelled at school and their extra-curricular activities and appear to be unaffected.<sup>77</sup>

Summit explains that children generally, regardless of how they deal with their abuse, “face[] an unbelieving audience when [they] complain of ongoing sexual abuse” and risk “not only disbelief, but scapegoating, humiliation and punishment as well.”<sup>78</sup> As a result, abused children often see no reason to voice the complaint.<sup>79</sup> “Whether the child is delinquent, hypersexual, countersexual, suicidal, hysterical, psychotic, or perfectly well-adjusted, and whether the child is angry, evasive or serene” the parents will ignore “the immediate affect and the adjustment pattern of the child” and will try to explain away the child’s allegations.<sup>80</sup>

### *E. Retraction*

Unfortunately, when children disclose their abuse, generally the threats made by their abusers become true: the child is called a liar, the child’s family is broken apart, and/or the child is taken away from the family home.<sup>81</sup> Often the mother guilts the child into retracting the statements about the abuse as a result of the disruption caused to the family.<sup>82</sup> “Once

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 187.

<sup>78</sup> *Id.* at 186.

<sup>79</sup> *Id.* at 187.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 188.

<sup>82</sup> *Id.*

again, the child bears the responsibility of either preserving or destroying the family.”<sup>83</sup> Telling the truth no longer seems the best choice, but instead the child must lie and recant, in order to preserve the family.<sup>84</sup> “Unless there is special support for the child and immediate intervention to force responsibility on the [abuser], the [child] will follow the ‘normal’ course and retract [the] complaint.”<sup>85</sup> The child will pretend the story was initially fabricated and give an excuse for initially fibbing; the adults will then believe this false version of events.<sup>86</sup>

## II. ADMITTANCE OF CSAAS EVIDENCE IN COURTS

Summit did not intend for CSAAS testimony “to prove that abuse occurred.”<sup>87</sup> Instead, he intended for it “to explain how children who are abused react to their maltreatment.”<sup>88</sup> By identifying prototypical behaviors, he aimed to provide therapists with a nondiagnostic tool, and not “a device for establishing the truth of a child’s statement.”<sup>89</sup> This intention, however, was not clear from his initial article, and both prosecutors and defense attorneys alike were exploiting Summit’s 1983 article to advance their own legal arguments.<sup>90</sup> Consequently, in 1992, in his article entitled “Abuse of the Child Sexual Abuse Accommodation Syndrome” Summit “attempted . . . to clear up some of the confusion surrounding [CSAAS’s] proper use and reliability.”<sup>91</sup>

Following the publishing of his 1983 article, CSAAS was used against criminal defendants on trial for child sexual assault and in family courts. Some prosecutors and experts argued that CSAAS was “akin to a diagnosis”<sup>92</sup> and argued that if children exhibited the “prototypical behaviors” of victims “a

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Myers, *supra* note 18, at 309.

<sup>88</sup> *Id.*

<sup>89</sup> Lucy Berliner, *The Use of Expert Testimony in Child Sexual Abuse Cases*, in *EXPERT WITNESSES IN CHILD ABUSE CASES: WHAT CAN AND SHOULD BE SAID IN COURT* 11, 17 (Stephen J. Ceci & Helene Hembrooke eds., 1998).

<sup>90</sup> See generally Roland C. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1 J. CHILD SEXUAL ABUSE 153 (1992); Weiss & Alexander, *supra* note 21, at 414.

<sup>91</sup> Cara Gitlin, Note, *Expert Testimony on Child Sexual Abuse Accommodation Syndrome: How Proper Screening Should Severely Limit its Admission*, 26 QUINNIPIAC L. REV. 497, 515 n.120 (2008) (citing Summit, *supra* note 90).

<sup>92</sup> *Id.*

psychologist [could] infer that abuse ha[d] occurred.”<sup>93</sup> Accordingly, judges generally allowed CSAAS testimony to be admitted into evidence as proof that child sexual abuse had occurred.<sup>94</sup> For example, in *Bussey v. Commonwealth of Kentucky*, one of the earliest cases to evaluate CSAAS evidence by name, there was no dispute that CSAAS evidence was proof of abuse.<sup>95</sup> Rather, the dispute centered on whether CSAAS evidence could be admitted against the defendant, the victim’s father, when it was a proven fact that the victim was previously sexually abused by her uncles.<sup>96</sup>

Today, the majority of state courts (“the majority states”) to address the admissibility of CSAAS evidence have barred it as proof that abuse has occurred.<sup>97</sup> Most of these courts, however, do permit CSAAS testimony for other purposes.<sup>98</sup> “For example, if the facts of a particular case show that the victim delayed reporting the abuse, recanted the allegations, kept the abuse secretive, or was accommodating to the abuse, then testimony

<sup>93</sup> Margaret Bull Kovera & Eugene Borgida, *Expert Scientific Testimony on Child Witnesses in the Age of Dalbert*, in *EXPERT WITNESSES IN CHILD ABUSE CASES: WHAT CAN AND SHOULD BE SAID IN COURT* 185, 197 (Stephen J. Ceci & Helene Hembrooke eds., 1998).

<sup>94</sup> Michael D. Stanger, *Throwing the Baby Out with the Bathwater: Why Child Sexual Abuse Accommodation Syndrome Should Be Allowed As A Rehabilitative Tool in the Florida Courts*, 55 U. MIAMI L. REV. 561, 581 (2001) (collecting cases).

<sup>95</sup> *Bussey v. Commonwealth*, 697 S.W.2d 139, 140 (Ky. 1985).

<sup>96</sup> *Id.*

<sup>97</sup> Stanger, *supra* note 94, at 570 (citing *State v. York*, 564 A.2d 389 (Me. 1989); *State v. Chamberlain*, 628 A.2d 704 (N.H. 1993); *State v. Schimpf*, 782 S.W.2d 186 (Tenn. Crim. App. 1989); *State v. Rimmasch*, 775 P.2d 388 (Utah 1989); *State v. Gokey* 574 A.2d 766 (Vt. 1990); *State v. Jones*, 863 P.2d 85 (Wash. Ct. App. 1993); *State v. Jensen*, 415 N.W.2d 519 (Wis. Ct. App. 1987)).

<sup>98</sup> *People v. Spicola*, 947 N.E.2d 620, 635 (N.Y. 2011) (“[T]he majority of states ‘permit expert testimony to explain delayed reporting, recantation, and inconsistency,’ as well as ‘to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear “emotionally flat” following sexual assault, why a child might run away from home, and for other purposes.” (quoting 1 MYERS, EVIDENCE § 6.24, at 416-22)); see *People v. Sandoval*, 79 Cal. Rptr. 3d 634, 639 (Cal. Ct. App. 2008) (“Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children’s seemingly self-impeaching behavior.”) (internal citations and quotations omitted); see also, e.g., *W.R.C. v. State*, 69 So. 3d 933, 937-39 (Ala. Crim. App. 2010); *State v. Moran*, 728 P.2d 248, 253-54 (Ariz. 1986); *People v. Bowker*, 249 Cal.Rptr. 886, 891 (Cal. Ct. App. 1988); *People v. Beckley*, 456 N.W.2d 391, 409-10 (Mich. 1990); *State v. Schnabel*, 952 A.2d 452, 462 (N.J. 2008); *Frenzel v. State*, 849 P.2d 741, 749 (Wyo. 1993); but see, e.g., *Hadden v. State*, 690 So. 2d 573, 580 n.5 (Fla. 1997) (finding CSAAS evidence inadmissible because such evidence does not satisfy the *Frye* test); *Sanderson v. Commonwealth*, 291 S.W.3d 610, 614 (Ky. 2009) (finding CSAAS testimony to never be admissible under Kentucky law); *State v. Doan*, 498 N.W.2d 804, 812 (Neb. 1993) (finding CSAAS evidence to be inadmissible because it takes the credibility determination away from the trier of fact in violation of Nebraska law); *Commonwealth v. Dunkle*, 602 A.2d 830, 836 (Pa. 1992) (finding CSAAS testimony to be too speculative to be properly admitted to a jury in a criminal trial).

about that particular characteristic of CSAAS would be admissible to dispel any myths the [trier of fact] may hold concerning that behavior.”<sup>99</sup> Because CSAAS is admitted only for these limited reasons, experts who testify about CSAAS often take the witness stand without ever having met the child and with no knowledge of the case; his or her testimony only conveys to the court the common characteristics of children who have been sexually abused to rehabilitate the child’s testimony.<sup>100</sup> Some courts also allow CSAAS evidence to be admitted to imply that the child’s behavior is consistent with that of an abused child, but this implication evidence is still only permitted as long as the expert “refrains from giving an explicit opinion on whether the abuse occurred” in that particular case.<sup>101</sup>

Even under these limitations, CSAAS may still be misleading to the fact-finder.<sup>102</sup> Although today CSAAS expert testimony is generally not introduced into evidence as proof of abuse, the general message of this testimony is that the fact-finder, “should believe the initial accusations made by a child and disbelieve the recantation.”<sup>103</sup> This is particularly troublesome in criminal proceedings where lay members of the jury will interpret this testimony to mean that the expert believes the accusations to be true, taking away the credibility determination from the jury.<sup>104</sup> Judges generally give a limiting instruction<sup>105</sup> in criminal proceedings explaining that “such

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<sup>99</sup> *Frenzel*, 849 P.2d at 749.

<sup>100</sup> *See generally Spicola*, 947 N.E.2d at 635 (finding the judge did not abuse his discretion in admitting CSAAS testimony by an expert who did not know the facts of the case and explained general information about CSAAS).

<sup>101</sup> *Stanger*, *supra* note 94, at 570 (citing *United States v. Bighead*, 128 F.3d 1329 (9th Cir. 1997); *United States v. St. Pierre*, 812 F.2d 417 (8th Cir. 1987); *Rodriguez v. State*, 741 P.2d 1200 (Alaska Ct. App. 1987); *State v. Reser*, 767 P.2d 1277 (Kan. 1989); *State v. Edelman*, 593 N.W.2d 419, (S.D. 1999); *State v. Bachman*, 446 N.W.2d 271 (S.D. 1989); *Gokey*, 574 A.2d at 766).

<sup>102</sup> *Weiss & Alexander*, *supra* note 21, at 412-13 (“A clinician testifying that an evaluatee has one of these conditions and that the only explanation for it is the criminal conduct of the defendant would tend to prejudice a jury . . . Overall, however, evidence of syndromes in court proceedings has been criticized as a major source of confusion, especially in sexual assault cases. This problem is particularly true of child sexual abuse and CSAAS testimony.”) (internal citations omitted); *see Berliner*, *supra* note 89, at 17 (“Unfortunately, in some cases, prosecutors offered and clinical experts testified that this syndrome was akin to a diagnosis and its presence was proof of a sexual abuse history. In part, the use of the term *syndrome* contributed to the confusion . . .”).

<sup>103</sup> *Newkirk v. Commonwealth*, 937 S.W.2d 690, 693 (Ky. 1996).

<sup>104</sup> *See id.* at 694.

<sup>105</sup> *See Frenzel v. State*, 849 P.2d 741, 749 (Wyo. 1993).



testimony is admitted only to explain victim behavior and is inadmissible on the issue of guilt.”<sup>106</sup>

Because CSAAS testimony may mislead the jury, courts in criminal trials “struggle with balancing testimony on CSAAS-related behaviors against the implication that the child was, in fact, abused” and admittance of this evidence is often in the face of many strong objections by defense counsel.<sup>107</sup> This balancing can be so difficult that “as a result of . . . the failure of some courts to distinguish proper and improper use of the syndrome, testimony that relies on or refers to CSAAS has been virtually banned in some jurisdictions,”<sup>108</sup> including Florida, Kentucky, Pennsylvania,<sup>109</sup> and Nebraska<sup>110</sup> (“the minority states”).

In the majority states, experienced attorneys defending those accused of child sexual abuse often challenge the admittance of CSAAS testimony into evidence under the state equivalent of Rule 703 of the Federal Rules of Evidence, which governs the admittance of expert testimony.<sup>111</sup> In *Daubert v. Merrell Dow Pharmaceuticals*,<sup>112</sup> the United States Supreme Court rejected the previously established “*Frye* test,”<sup>113</sup> which regulated expert testimony, finding that it was replaced by Rule 703.<sup>114</sup> The Supreme Court in *Daubert* established a two-part test for judges to employ to interpret Rule 703 accurately—the testimony must be “scientific knowledge” and

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<sup>106</sup> Weiss & Alexander, *supra* note 21, at 412-13 (internal citation omitted).

<sup>107</sup> *Id.* at 414-15 (internal citation omitted).

<sup>108</sup> Berliner, *supra* note 89, at 17 (internal citation omitted). This note, thus, is meant to aid attorneys in jurisdictions where CSAAS has not been banned.

<sup>109</sup> Stanger *supra* note 94, at 572 (citing *Hester v. Commonwealth*, 734 S.W.2d 457 (Ky. 1987); *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992)); see *Hadden v. State*, 690 So. 2d 573 (Fla. 1997).

<sup>110</sup> *State v. Doan*, 498 N.W.2d 804, 812 (Neb. 1993).

<sup>111</sup> Weiss & Alexander, *supra* note 21, at 415 (citing FED. R. EVID. 703). Rule 703 reads, “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.” FED. R. EVID. 703.

<sup>112</sup> 509 U.S. 579, 570 (1993).

<sup>113</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Frye* test requires expert testimony be “generally accepted in the scientific community.” David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 10 (1986) (internal citation omitted).

<sup>114</sup> Dana G. Deaton, *The Daubert Challenge to the Admissibility of Scientific Evidence*, 60 AM. JUR. TRIALS 17-18 (1996) (internal citation omitted).

must “logically advance[] a material aspect of the case.”<sup>115</sup> The trial court judges, in applying this two-part test, must act as “gatekeepers” and determine, at the beginning of the trial, whether the testimony will be admitted.<sup>116</sup>

A “*Daubert* hearing is an ideal venue to test the validity and reliability of the syndrome.”<sup>117</sup> *Daubert* hearings “allow [for an] inquiry into whether the syndrome is diagnostic or nondiagnostic.”<sup>118</sup> If the court determines “the syndrome is nondiagnostic,” as Summit intended, evidence of the syndrome cannot be admitted as substantive evidence of abuse against the accused.<sup>119</sup> “If the syndrome is diagnostic, the hearing affords an opportunity to locate the syndrome along the continuum of diagnostic certainty.”<sup>120</sup>

In jurisdictions that allow for CSAAS evidence to be admitted, judges must determine in what capacity this testimony may be admitted against the accused. For example, in 1993 the New Jersey Supreme Court in *State v. J.Q.* held “that CSAAS has a sufficiently reliable scientific basis to allow an expert witness to describe traits found in victims of such abuse to aid jurors in evaluating specific defenses.”<sup>121</sup> Although the New Jersey Supreme Court found CSAAS testimony to be reliable, the court also found the lower court had erred in admitting the CSAAS testimony against that defendant.<sup>122</sup> The court stated that the expert’s testimony “included opinions on commonplace issues, such as credibility assessments derived from conflicting versions of an event and not-yet scientifically established opinions” which were the ultimate issues the fact-finder was to resolve.<sup>123</sup>

### III. CSAAS ACROSS THE COUNTRY

There are few, if any, published family court judicial opinions that rely on CSAAS testimony in custody and visitation determinations; rather, published cases discussing CSAAS testimony generally take place in child sexual abuse criminal

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Myers, *supra* note 18, at 309.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *State v. J.Q.*, 617 A.2d 1196, 1197 (N.J. 1993).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1197-98.

proceedings.<sup>124</sup> Although there is vast difference between criminal proceedings and family court proceedings—the burden of proof, the stakes, the parties, the trier of fact—criminal proceedings involving CSAAS can serve as a learning tool for attorneys representing parents against whom CSAAS may be admitted. These attorneys must keep in mind, however, that family court and criminal court operate by completely different rules and that family courts may treat CSAAS evidence differently than criminal courts. The following cases outline the three main avenues courts can take when determining whether to admit CSAAS testimony.

A. *New Jersey: State v. J.Q.*<sup>125</sup>

*State v. J.Q.* is a child-sexual-abuse criminal case in which two young girls, Connie and Norma, accused their father of sexually abusing them.<sup>126</sup> The girls' parents, Karen and John, met in the early 1970s and began a relationship.<sup>127</sup> The couple did not marry, but gave birth to their daughters in 1977 and 1979.<sup>128</sup> Due to financial issues and allegations of unfaithfulness, Karen and John separated in 1984.<sup>129</sup> The couple officially ended their relationship shortly thereafter when Connie was eight years old and Norma was six years old.<sup>130</sup> After the breakup, John would spend time on the weekends with his daughters at his one-room apartment he shared with a woman he later married in 1987.<sup>131</sup>

Two years later, "Karen learned that Norma, during play, had attempted to pull down her younger sister's underwear and touch her buttocks."<sup>132</sup> After being questioned by her mother, Norma identified her father as the person who taught her to behave in that manner.<sup>133</sup> Although incredulous to her

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<sup>124</sup> *E.g., id.* at 1197; *W.R.C. v. State*, 69 So. 3d 933 (Ala. Crim. App. 2010); *Sanderson v. Commonwealth*, 291 S.W.3d 610 (Ky. 2009).

<sup>125</sup> Under New Jersey law, child sexual abuse opinions should be written using initials, rather than the parties' names in order to protect the identities of the parties. The Supreme Court of New Jersey decided to "use fictitious names to describe the parents and children involved . . . refer[ing] to the mother as 'Karen,' the father as 'John,' and the two children as 'Connie' and 'Norma.'" *J.Q.*, 617 A.2d at 1198.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

daughter's allegations initially, Norma eventually contacted a counselor and the police.<sup>134</sup>

At John's trial, Dr. Milchman, a psychologist, testified "as an expert witness on child sexual abuse" about CSAAS.<sup>135</sup> She described CSAAS "as a pattern of behavior that is found to occur again and again in children who are victims of incest."<sup>136</sup> Dr. Milchman described the elements of CSAAS and testified to their relevance in the cases of Connie and Norma.<sup>137</sup> Dr. Milchman testified that "in her expert opinion, Connie and Norma had been sexually abused."<sup>138</sup>

John was convicted "of multiple counts of first-degree aggravated sexual assault on Connie and Norma for various acts of penetration and oral sex, and of two counts of endangering the welfare of a child . . . [and] sentenced . . . to thirty years' imprisonment, with ten years of parole ineligibility."<sup>139</sup> The conviction was reversed, however, when the Appellate Division found the trial court had admitted CSAAS evidence to "establish the credibility" of the children rather than to rehabilitate them, such as to explain why disclosure of abuse was delayed.<sup>140</sup>

In affirming the decision, the Supreme Court of New Jersey embarked on a lengthy discussion of the use of behavioral science in child sexual abuse cases.<sup>141</sup> Despite an abundance of both legal and medical literature in favor of using behavioral science evidence, the court stated that "most courts do not approve such testimony as substantive evidence of abuse."<sup>142</sup> Instead, the court found that many states permit behavioral science testimony to be admitted for other purposes such as "to rehabilitate" the victim after the defense argues the victim is untrustworthy since she has recanted her story or delayed in reporting her abuse.<sup>143</sup>

The court next considered whether behavioral science could be used by an expert witness to state whether in his or her expert opinion a child was sexually abused.<sup>144</sup> Although

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (internal quotation marks omitted).

<sup>137</sup> *Id.* at 1199.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (citing *State v. J.Q.*, 599 A.2d 172 (1991)).

<sup>141</sup> *Id.* at 1200-03.

<sup>142</sup> *Id.* at 1201 (internal quotation marks omitted).

<sup>143</sup> *Id.* (internal quotation marks omitted).

<sup>144</sup> *Id.*

only citing two occasions where other courts allowed behavioral science testimony to be used in this way,<sup>145</sup> the court left open “the possibility that a qualified behavioral-science expert could demonstrate a sufficiently reliable scientific opinion to aid a jury in determining the ultimate issue that the abuse had occurred” under the right circumstances.<sup>146</sup> Relying on the literature, the court directed future trial court judges to evaluate the witness’s qualifications to determine if the witness possesses “the requisite degree of scientific reliability” before allowing an expert to testify in this manner.<sup>147</sup>

Next, the court turned specifically to CSAAS testimony.<sup>148</sup> The court noted that CSAAS testimony “has been placed within the category of behavioral-science testimony that describes behaviors commonly observed in sexually-abused children.”<sup>149</sup> Despite the strength of the literature backing behavioral-science testimony such as CSAAS, “[c]ourts rarely permit the testimony for the purpose of establishing substantive evidence of abuse, but [generally] allow it to rehabilitate the victim’s testimony.”<sup>150</sup> For example, CSAAS evidence may be admitted after “the defense asserts that the child’s delay in reporting the abuse and recanting of the story indicate that the child is unworthy of belief.”<sup>151</sup> After a detailed analysis of Summit’s work and the CSAAS elements, the court looked to whether CSAAS testimony is admissible under New Jersey law.<sup>152</sup> It explained that expert testimony is only admissible under Rule 56 of the New Jersey Rules of Evidence<sup>153</sup> when “it relates to a subject-matter beyond the understanding of persons of ordinary experience, intelligence, and knowledge,”<sup>154</sup> and has “[a]cceptance within [the] scientific community.”<sup>155</sup>

The court acknowledged that the scientific community has accepted the “theory that CSAAS identifies or describes

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<sup>145</sup> *Id.* at 1202 (citing Myers et al., *supra* note 30, at 80-85).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 1203.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (internal citations omitted).

<sup>151</sup> *Id.* at 1201 (internal citation omitted).

<sup>152</sup> *Id.* at 1205.

<sup>153</sup> Rule 56 has been replaced and amended by Rule 702 of the New Jersey Rules of Evidence. *State v. Berry*, 658 A.2d 702, 707 (N.J. 1995).

<sup>154</sup> *J.Q.*, 617 A.2d at 1205 (citing *State v. Kelly*, 478 A.2d 364 (N.J. 1993); *Evers v. Dollinger*, 471 A.2d 405 (N.J. 1984)).

<sup>155</sup> *Id.* (citing *State v. Kelly*, 478 A.2d 364 (N.J. 1993)).

behavioral traits commonly found in child-abuse victims.”<sup>156</sup> It noted, however, that there is criticism of CSAAS evidence because there is overlap between the CSAAS behaviors and those observed in other syndromes.<sup>157</sup> Thus, the court came to the single, most-important realization that attorneys must remember when their clients are facing CSAAS evidence: “*the existence of the symptoms does not invariably prove abuse.*”<sup>158</sup> As a result, the court established that in New Jersey CSAAS evidence could only be “presented to the jury in accordance with its scientific theory,” namely why a child accommodated the abuse or did not disclose promptly.<sup>159</sup>

Finally, the court analyzed whether in *J.Q.* Dr. Milchman’s expert CSAAS testimony was properly admitted before the jury.<sup>160</sup> While the court was unclear whether Dr. Milchman’s opinion that the children were sexually abused was reached “on the basis of her credibility assessments or on the basis of her understanding of CSAAS evidence,” the court held that her opinion was improperly admitted.<sup>161</sup> If her opinion was based on her understanding of CSAAS evidence, the court held that the evidence would be improperly admitted “because CSAAS is not relied on in the scientific community to detect abuse.”<sup>162</sup> The court further explained:

Summit did not intend the accommodation syndrome as a diagnostic device. The syndrome does not detect sexual abuse. Rather, it assumes the presence of abuse, and explains the child’s reactions to it . . . With child sexual abuse accommodation syndrome . . . one reasons from presence of sexual abuse to reactions to sexual abuse. Thus, the accommodation syndrome is not probative of abuse.<sup>163</sup>

The court further endorsed the use of CSAAS testimony to rehabilitate children in the courtroom setting.<sup>164</sup> Adopting the comments of Professor John E. B. Myers and his colleagues, the court stated that CSAAS can justify why many children who have been abused recant their allegations or delay

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<sup>156</sup> *Id.* at 1206 (internal citation omitted); Chandra Lorraine Holmes, *Child Sexual Abuse Accommodation Syndrome: Curing the Effects of a Misdiagnosis in the Law of Evidence*, 25 TULSA L.J. 143, 158-59 (1989)).

<sup>157</sup> *J.Q.*, 617 A.2d at 1206.

<sup>158</sup> *Id.* (emphasis added).

<sup>159</sup> *Id.* at 1207.

<sup>160</sup> *J.Q.*, 617 A.2d at 1209.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (internal citation omitted).

<sup>163</sup> *Id.* (internal citation omitted).

<sup>164</sup> *Id.*

disclosing their abuse.<sup>165</sup> Furthermore, the court found that, “[i]f use of the syndrome is confined to these rehabilitative functions, the confusion clears, and the accommodation syndrome serves a useful forensic function.”<sup>166</sup> Because Dr. Milchman’s CSAAS testimony was not used for this rehabilitative function, the court reasoned that her testimony was improperly admitted.<sup>167</sup>

The New Jersey Supreme Court stuck as closely to Summit’s intent as possible.<sup>168</sup> As a result, the *J.Q.* decision became instrumental in helping other states’ highest courts, including the Supreme Court of Kentucky, to establish whether and how their state would admit CSAAS evidence.<sup>169</sup>

### B. *Kentucky: Sanderson v. Commonwealth of Kentucky*<sup>170</sup>

One of the first states to consider CSAAS testimony in 1985, Kentucky has historically rejected the admittance of CSAAS testimony into evidence.<sup>171</sup> The Supreme Court of Kentucky “has not accepted the view that . . . CSAAS or any of its components has attained general acceptance in the scientific community justifying its admission into evidence to prove sexual abuse or the identity of the perpetrator.”<sup>172</sup> Historically, Kentucky courts have rejected CSAAS evidence on relevance grounds, finding CSAAS evidence does not “make the existence of any fact of consequence more probable or less probable than it would have been without the evidence.”<sup>173</sup> In *Sanderson v. Commonwealth of Kentucky*, the Supreme Court of Kentucky further expressed its distaste for CSAAS, describing it as

<sup>165</sup> *Id.* at 1210 (internal citation omitted) (“Since this ‘syndrome’ is only a piece of the child sexual abuse machinery, testimony concerning CSAAS may only be offered for the purpose for which it was defined—to explain the child’s irrational behavior.”).

<sup>166</sup> *Id.* at 1209.

<sup>167</sup> *Id.* at 1211.

<sup>168</sup> See generally *id.* at 1209 (internal citation omitted).

<sup>169</sup> E.g., *Steward v. State*, 652 N.E.2d 490 (Ind. 1995); *Sanderson v. Commonwealth*, 291 S.W.3d 610 (Ky. 2009); *Commonwealth v. Hudson*, 631 N.E.2d 50 (Mass. 1994); *People v. Peterson*, 537 N.W.2d 857 (Mich. 1995).

<sup>170</sup> 291 S.W.3d at 610.

<sup>171</sup> *Id.* at 617 (Scott, J. dissenting) (citing *Kurtz v. Commonwealth*, 172 S.W.3d 409, 413, 414 (Ky. 2005); *Miller v. Commonwealth*, 77 S.W.3d 566, 571, 572 (Ky. 2002); *Newkirk v. Commonwealth*, 937 S.W.2d 690, 691-96 (Ky. 1996); *Hall v. Commonwealth*, 862 S.W.2d 321, 322, 323 (Ky. 1993); *Hellstrom v. Commonwealth*, 825 S.W.2d 612, 613, 614 (Ky.1992); *Dyer v. Commonwealth*, 816 S.W.2d 647, 652-54 (Ky. 1991); *Brown v. Commonwealth*, 812 S.W.2d 502, 503, 504 (Ky. 1991); *Mitchell v. Commonwealth*, 777 S.W.2d 930, 932, 933 (Ky. 1989); *Hester v. Commonwealth*, 734 S.W.2d 457, 458 (Ky. 1987); *Lantrip v. Commonwealth*, 713 S.W.2d 816, 817 (Ky. 1986); *Bussey v. Commonwealth*, 697 S.W.2d 139, 140, 141 (Ky.1985)).

<sup>172</sup> *Newkirk*, 937 S.W.2d at 693.

<sup>173</sup> *Id.* (citing KY. R. EVID. 401).

“generic and unreliable.”<sup>174</sup> The facts of *Sanderson* are simple—the complainant, B.T., alleged she had been sexually abused by her step-father.<sup>175</sup>

In December 2000, the appellant married Mendy, the mother of B.T.<sup>176</sup> After the wedding, Mendy and B.T. “moved into [the] Appellant’s house” which included a garage.<sup>177</sup> In 2006, B.T. accused her step-father of abusing her multiple times each week since the family moved in together.<sup>178</sup> B.T. testified that her step-father threatened to hurt her if she ever tried to disclose the abuse.<sup>179</sup> B.T. testified that the abuse always “took place in the garage,” and after the family moved to a new home, the abuse occurred “in the garage, in B.T.’s room, and in Mendy’s room.”<sup>180</sup>

After Mendy and the appellant had a baby, they began “experiencing marital problems.”<sup>181</sup> The couple sought divorce, and the appellant left the marital home on February 25, 2006.<sup>182</sup> Two months later, a parent of one of B.T.’s friends told Mendy that during a visit to the marital home years earlier, her daughter “watched a pornographic movie with B.T. and Appellant.”<sup>183</sup> Although initially denying the story, B.T. eventually admitted to Mendy that she had “watched the movie and told Mendy about the abuse that had taken place.”<sup>184</sup>

The appellant was eventually indicted, and was convicted by a jury “of two counts of Second-Degree Sodomy and three counts of First-Degree Sexual abuse.”<sup>185</sup> He “was sentenced to thirty-five years in prison.”<sup>186</sup> On appeal, the Appellant argued that the trial court erred in admitting CSAAS evidence against him.<sup>187</sup>

The appellant objected to the CSAAS symptom testimony “from Mendy, Brian Terrell (B.T.’s father), and Lori Brown, a clinical psychologist.”<sup>188</sup> All three witnesses testified

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<sup>174</sup> *Sanderson*, 291 S.W.3d at 614.

<sup>175</sup> *Id.* at 611.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 612.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*



to “B.T.’s physical and psychological ‘symptoms,’” but “the most damaging testimony came from Brown, a clinical psychologist who counseled B.T. and gave testimony that B.T.’s addition of new allegations of sexual abuse [wa]s normal.”<sup>189</sup>

The Supreme Court of Kentucky evaluated the State’s precedent that generally rejected the introduction of CSAAS evidence.<sup>190</sup> The general rule against CSAAS testimony was established in *Miller v. Commonwealth*:

[A] party cannot introduce evidence of the habit of a class of individuals either to prove that another member of the class acted the same way under similar circumstances or to prove that the person was a member of that class *because* he/she acted the same way under similar circumstances.<sup>191</sup>

Essentially, this means that “[w]here a victim had delayed reporting of abuse, [it is] improper [to admit] testimony of a seasoned child sex abuse investigator [to] state[] that it was common, in her experience, for sexually abused victims to delay reporting of the abuse.”<sup>192</sup> Building off that rule, the Kentucky Supreme Court further showed its distrust of CSAAS testimony in *Newkirk v. Commonwealth of Kentucky*.<sup>193</sup> There, the court stated that there are many reasons to exclude CSAAS testimony including: “the lack of diagnostic reliability, the lack of general acceptance within the discipline from which such testimony emanates, and the overwhelmingly persuasive nature of such testimony effectively dominating the decision-making process, uniquely the function of the jury.”<sup>194</sup>

With this precedent in mind, the court examined Brown’s testimony.<sup>195</sup> Although never mentioning CSAAS specifically, “Brown testified that it is normal for child victims of sexual abuse, like B.T., to add details about their abuse after they have been in counseling for an extended period of time and to appear happy in their outward life . . . .”<sup>196</sup> The court found error with this testimony, however, describing it as “the exact type of generic and unreliable evidence this court has repeatedly held to be reversible error.”<sup>197</sup> The court reversed the

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 613.

<sup>191</sup> *Miller v. Commonwealth*, 77 S.W.3d 566, 572 (Ky. 2002) (emphasis in original).

<sup>192</sup> *Sanderson*, 291 S.W.3d at 613 (internal quotation marks omitted).

<sup>193</sup> *Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1996).

<sup>194</sup> *Sanderson*, 291 S.W.3d at 613 (internal quotation marks omitted).

<sup>195</sup> *Id.* at 614.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

conviction and remanded the case to the trial court for a new trial due to the improper CSAAS testimony admitted.<sup>198</sup>

The *Sanderson* case is an important tool for attorneys in Kentucky defending against sexual abuse allegations. Moreover, this case provides a basis for attorneys in other jurisdictions to mount objections to the introduction of CSAAS evidence to substantiate children's claims of sexual abuse. In fact, *Sanderson* outlines the key arguments against CSAAS evidence, specifically noting its unreliable nature.

C. *Alabama: W.R.C. v. State*<sup>199</sup>

Attorneys representing clients accused of sexual abuse of a child in Alabama do not have the same precedential backing to object to the use of CSAAS evidence at trial. Recently, when faced with an analogous issue to that of the Kentucky Supreme Court in *Sanderson*, the Alabama Court of Criminal Appeals,<sup>200</sup> in *W.R.C. v. State*, declined to follow the *Sanderson* holding and instead found that CSAAS testimony may be admitted against the defendant when the testimony relates to child victims generally and not to specific victims.<sup>201</sup>

At the trial of W.R.C., the prosecutor admitted CSAAS evidence against him.<sup>202</sup> A jury convicted W.R.C. of first degree sodomy and sexual abuse, and he was sentenced to a total of 30 years imprisonment.<sup>203</sup> W.R.C. appealed his conviction, specifically objecting to the admittance of CSAAS evidence against him at his trial.<sup>204</sup>

The alleged victim, L.O., who "lived with his grandmother, E.O.," accused his grandmother's husband, W.R.C., of sexually abusing him "over the span of a month" when he was seven years old (10 years before the start of trial).<sup>205</sup> L.O. testified that following the abuse "W.R.C. told him to 'keep this between us' and threatened that if L.O. told anyone, he would kill both L.O. and E.O."<sup>206</sup>

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<sup>198</sup> *Id.*

<sup>199</sup> *W.R.C. v. State*, 69 So. 3d 933 (Ala. Crim. App. 2010).

<sup>200</sup> The Alabama Court of Criminal Appeals is the intermediate appellate court in Alabama. Ala. Appellate Courts, *Judicial System Chart*, JUDICIAL.ALABAMA.GOV, [http://judicial.alabama.gov/chart\\_judicial.cfm](http://judicial.alabama.gov/chart_judicial.cfm) (last visited Jan. 11, 2015).

<sup>201</sup> *W.R.C.*, 69 So. 3d at 939-40 (citing *Sanderson*, 291 S.W.3d at 610).

<sup>202</sup> *Id.* at 936.

<sup>203</sup> *Id.* at 934.

<sup>204</sup> *Id.* at 934-36.

<sup>205</sup> *Id.* at 934.

<sup>206</sup> *Id.* at 935.

At trial L.O. listed a number of reasons to explain why he did not disclose the abuse sooner: “because he did not want to talk about it; because he knew no one else who was suffering from something similar; because even though E.O. and W.R.C. separated shortly after the incidents, they still communicated; and because he did not want to hurt his grandmother.”<sup>207</sup> L.O. testified that when he was 15 or 16 years old, he finally disclosed the assaults to an aunt with whom he was living.<sup>208</sup>

On appeal, W.R.C. argued “that the trial court erred in allowing what he claims was expert testimony regarding [CSAAS]<sup>209</sup> and delayed disclosure by child sexual-abuse victims from Maribeth Thomas, the clinical director of the Prescott House Child Advocacy Center.”<sup>210</sup> W.R.C. objected to Thomas’s testimony at trial as well.<sup>211</sup> In response to W.R.C.’s objection, “the prosecutor pointed out that Thomas had never interviewed or even met L.O. and that she was not going to testify about L.O. at all,” but rather about behaviors common to abused children across the country.<sup>212</sup> Despite W.R.C.’s objection, Thomas was deemed “an expert in child development and child and adolescent sexual abuse.”<sup>213</sup> During her testimony, Thomas explained:

... that in her experience and based on research done in the subject area, child victims of sexual or physical abuse do not always disclose the abuse and that nondisclosure may be because the perpetrator is an adult or a family member, because the child does not have the vocabulary to describe the abuse, because the child fears the consequences of disclosure, or because the perpetrator has threatened the child . . . [;] “that both experientially and the research

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> As in *Sanderson*, the expert did not specifically testify to CSAAS evidence. Nevertheless, the court, for purposes of the appeal, presumed that the expert’s testimony related to CSAAS evidence. The court stated, “Thomas, however, did not testify regarding any syndrome or about any ‘typical’ characteristics of abused children; her testimony was limited to delayed disclosure by some child victims and the possible reasons for such delayed disclosure. All of her testimony was based on her own experience in working with abused children and on research that had been done in the field of abused children. In addition, as noted above, Thomas specifically testified on cross-examination that all children are different and that every child victim reacts differently to abuse. Thus, we seriously question whether Thomas’s testimony can be considered testimony regarding CSAAS. That being said, delayed disclosure is considered one element of CSAAS, and, as such, Thomas’s testimony in this regard is not necessarily outside the realm of CSAAS testimony. For the purposes of this opinion, then, we presume that Thomas’s testimony falls within the category of CSAAS testimony, and we address it as such.” *Id.* at 938.

<sup>210</sup> *Id.* at 936.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 937.

indicates that male victims are less likely to disclose than female victims” . . . and that there is a “significant difference” between males and females with respect to delayed disclosure . . . [;] that when the perpetrator is a family member, both her experience and research in the area indicate that child victims are more likely not to disclose or to delay disclosure . . . [;] that statistics indicate child sexual-abuse victims “more often than not” delay disclosing the abuse . . . [;] that such delayed disclosure may be the result of a lack of understanding of how to make the disclosure, which is why sometimes children will disclose in the fifth or sixth grade, when the state begins sex education for students . . . [;] that delayed disclosure could be the result of fear by the child victim of the consequences of disclosing the abuse . . . [; that] when disclosure is made, it is typically made to someone the child victim trusts . . . [; and] that it is not unusual for a child victim not to be able to provide a specific date that the abuse occurred unless the abuse occurred on a typically memorable day, such as Christmas or a birthday.<sup>214</sup>

On cross-examination, defense counsel was able to challenge Thomas, leading her to admit “that every child is different and that not all children react the same way to abuse—some child victims show no signs of dysfunction at all, while others show dramatic signs of dysfunction.”<sup>215</sup> The other witnesses on cross-examination also admitted that “L.O. exhibited no signs of dysfunction, had good grades in school, and was active in extracurricular activities at school.”<sup>216</sup>

On appeal, W.R.C. argued that at his trial Thomas’s CSAAS testimony was improperly admitted in violation of Alabama Rule 702,<sup>217</sup> because, since “there is no consensus in the scientific community as to the ‘typical’ characteristics or behaviors of sexually abused children, testimony about CSAAS cannot satisfy the reliability requirement for admission” of scientific evidence pursuant to Rule 702 and the *Daubert* standard.<sup>218</sup> The court clarified, however, that under Alabama common law, nonscientific expert evidence is not subject to the *Daubert* standard.<sup>219</sup> Instead, nonscientific expert evidence may be admitted under Rule 702 if the witness is “qualified as an expert in the field” and the testimony “assist[s] the trier of fact.”<sup>220</sup> Here the court found that Rule 702 (as well as Rule

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 937.

<sup>216</sup> *Id.*

<sup>217</sup> “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ALA. R. EVID. 702.

<sup>218</sup> *W.R.C.*, 69 So. 3d at 938.

<sup>219</sup> *Id.* at 938-39 (internal citation omitted).

<sup>220</sup> *Id.* at 939 (internal citation omitted).

403)<sup>221</sup> was satisfied since Thomas was declared as an expert by the trial court in “child development and child and adolescent sexual abuse,” and because her testimony about “delayed disclosure” aided the jury in understanding why L.O. waited almost a decade to disclose his abuse.<sup>222</sup>

Most importantly, the court pointed out that the evidence was proper because Thomas did not testify specifically about L.O., but instead about abused children generally.<sup>223</sup> Thomas did not “testify that L.O.’s behavior was consistent with children who had been sexually abused or that she believed L.O.’s accusations.”<sup>224</sup> Furthermore, Thomas never said whether L.O. had suffered abuse.<sup>225</sup>

In Alabama, as a result of *W.R.C.*, attorneys will most likely have CSAAS evidence admitted against their clients. They will, however, be able to limit the testimony to general testimony about children who have been sexually abused, not about the victim.

#### IV. OBJECTIONS TO CSAAS EVIDENCE

Custody proceedings generally take place in a state’s Family Court, in front of a single judge who will determine the fate of the family.<sup>226</sup> In these proceedings, the rules of evidence are often relaxed in order to allow the judge to obtain as much information about the child and the parties as possible.<sup>227</sup> The relaxed evidentiary rules, combined with the admission of CSAAS evidence, will present challenges to attorneys defending a parent accused of sexual abuse. Although in the majority of states CSAAS testimony is admissible to rehabilitate the child,

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<sup>221</sup> “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ALA. R. EVID. 403.

<sup>222</sup> *W.R.C.*, 69 So. 3d at 939.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> GOLDZBAND, *supra* note 7, at 168 (“The tragedy rests on the fact that judges are still called on to determine the disposition of fought-over children, even in these supposedly enlightened days in which child advocacy is emerging as the dominant trend in resolving custody battles.”).

<sup>227</sup> See Mark Hardin, *Child Protection Cases in A Unified Family Court*, 32 FAM. L.Q. 147, 179 (1998); see generally Hon. Bruce A. Newman, *Evidentiary Rules and Standards of Proof in Child Neglect and Abuse Cases*, 75 MICH. B.J. 1165, 1165-66 (1996) (explaining some of the unique rules in juvenile court including the admittance of testimony of “prior bad acts” to show propensity and hearsay evidence); e.g., WASH. REV. CODE ANN. § 9A.44.120 (West 2013).

attorneys representing the accused parent should object to the admittance of CSAAS testimony and outline the many shortcomings of CSAAS to the judge.<sup>228</sup>

Under Rule 26 of the Federal Rules of Evidence, and its state counterparts, parties seeking to admit expert testimony of a witness during trial must put the court and the opposing parties on notice.<sup>229</sup> Consequently, attorneys representing the accused parent will know in advance if opposing counsel intends to admit expert testimony on CSAAS during the trial. Once put on notice, the accused parent's attorney should, prior to trial, move to exclude any expert testimony on CSAAS under a *Daubert* motion.<sup>230</sup>

Based on the shortcomings of CSAAS evidence discussed *supra*, below I have delineated various arguments attorneys representing clients accused of sexually abusing their child should make in support of their motion to exclude expert testimony on CSAAS. Each argument outlined below should, of course, be briefed in their motion papers, as well. Attorneys should not consider this to be a comprehensive list and should make as many objections as possible.

#### A. *CSAAS is Not a Diagnostic Tool*

The most troublesome defect of CSAAS is that it is not a tool to discover whether a child has been sexually abused.<sup>231</sup> In fact, “[n]owhere in Summit’s 1983 article does he ever claim that it should be used for this purpose.”<sup>232</sup> Instead, Summit has continuously stated that “such utilization is inappropriate and

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<sup>228</sup> See generally GARDNER, *supra* note 1, at 297.

<sup>229</sup> Robert C. Morgan & Ashe P. Puri, *Expert Witnesses and Daubert Motions*, 5 SEDONA CONF. J. 15, 20 (2004) (citing FED. R. CIV. P. 26). The relevant part of Rule 26 of the Federal Rules of Evidence reads, “In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.” FED. R. CIV. P. 26(a)(2)(A).

<sup>230</sup> Morgan & Puri, *supra* note 229, at 20. The majority of states have adopted *Dalburt*, and consequently a *Daubert* motion should be made. As of 2013, only a handful of states have not adopted *Daubert*. In those states, a *Frye* motion should be made. See generally Kat S. Hatziaframidis, *Florida State Courts Adopt Daubert Standard, Changing the Way Expert Testimony Operates*, FORENSISGROUP (July 7, 2014), <http://www.forensisgroup.com/our-blog/florida-state-courts-adopt-daubert-standard-changing-the-way-expert-testimony-operates>.

<sup>231</sup> Myers, *supra* note 18, at 309 (quoting Mary B. Meinig, *Profile of Roland Summit*, 1 VIOLENCE UPDATE 6, 6 (1991)); see Hall v. State, 611 So. 2d 915, 919 (Miss. 1992) (“[CSAAS] was not meant to be used as a diagnostic device to show that abuse had, in fact, occurred.”).

<sup>232</sup> GARDNER, *supra* note 1, at 298; see generally Summit, *supra* note 2, at 177.

goes beyond the intentions of his description”<sup>233</sup> and sought to clarify CSAAS’s purpose in his 1992 clarification article.<sup>234</sup> Thus, if an opponent seeks to introduce CSAAS evidence as substantive evidence of abuse, the accused’s attorney must object to this inappropriate use of Summit’s work.<sup>235</sup> The attorney’s objection to this misappropriation should be as follows: “*Your honor, CSAAS evidence should not be admitted in this trial. Mrs. Smith’s attorney is seeking to admit CSAAS evidence as proof that Jane was sexually abused. This, however, is an incorrect use of CSAAS evidence. The scientific community does not consider CSAAS as a tool to determine whether a child has been sexually abused or not. All CSAAS does is explain how children who have been abused respond to their abuse. CSAAS, does not, however, tell us whether a child, like Jane, has been abused. In fact, following Dr. Summit’s 1983 article identifying CSAAS, prosecutors and defense attorneys used CSAAS evidence in exactly this way, and Dr. Summit wrote a follow-up article criticizing this improper use of his article. Furthermore, as the New Jersey Supreme Court in State v. J.Q. explained, the majority of courts across the nation do not admit CSAAS evidence ‘as substantive evidence of abuse.’*”<sup>236</sup>

### B. CSAAS is Obsolete

The second weakness of CSAAS testimony is that it is inapplicable to our modern world.<sup>237</sup> CSAAS is relatively outdated, having been established in 1983.<sup>238</sup> Relying on the stories of sexual abuse victims of the early 1980s, CSAAS explains that children may delay disclosure of their abuse or recant their stories because of fear of not being believed by adults, specifically their mothers and the police.<sup>239</sup> Today, however, sexual abuse allegations are progressively more common.<sup>240</sup> In fact, unlike in 1983, modern “mothers are much more likely to believe the child[,] and the police and child protective services . . . are likely to [err on the side of caution and] accept as valid even the most frivolous and absurd

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<sup>233</sup> GARDNER, *supra* note 1, at 298.

<sup>234</sup> Summit *supra* note 90; Weiss & Alexander, *supra* note 21, at 414.

<sup>235</sup> Hall, 611 So. 2d at 919; *see* Myers, *supra* note 18, at 318.

<sup>236</sup> State v. J.Q., 617 A.2d 1196, 1201 (N.J. 1993) (quoting Myers et al., *supra* note 142, at 68 (internal citations omitted)).

<sup>237</sup> *See generally* GARDNER, *supra* note 1 at 297-98.

<sup>238</sup> *Id.* at 298.

<sup>239</sup> Summit, *supra* note 2, at 187-89.

<sup>240</sup> Paquette, *supra* note 7 (internal citation omitted).

accusations.”<sup>241</sup> With this change in society, it is no longer appropriate to use CSAAS evidence to explain delays in exposure or recantations. Consequently, when the accusing parent’s attorney seeks to introduce CSAAS evidence to rehabilitate the child, the accused parent’s attorney must object to the obsolete nature of CSAAS evidence. The attorney may object by arguing: “*Your honor, CSAAS is incredibly obsolete and inapplicable to our case. CSAAS was developed in 1983, a time when sexual abuse allegations were less common and children who accused their parents of sexually abusing them were not believed, especially by their mothers. It was under these circumstances that Dr. Summit created CSAAS. Dr. Summit explained that children often delay disclosure of their abuse or recant for fear that they would not be believed. This is no longer the case. Children are taught now from an early age that if an adult touches them inappropriately they should tell an adult immediately. Children are no longer under the pressure Dr. Summit described. In fact, Dr. Summit specifically said many girls recant their stories because mothers do not believe them, but here, not only does Mrs. Smith believe the accusation, she was the one who brought the accusation to the court’s attention. As a result, evidence that Jane recanted is not evidence that she was abused and felt pressure from her mother to recant, but rather it is evidence that she is less credible because she has changed her story.*”

C. CSAAS Creates a “No-win Situation” for the Accused

The third problem with CSAAS evidence is that it creates a “no-win situation” for the accused.<sup>242</sup> According to CSAAS, a common characteristic of children who have been sexually abused is that they often recant their allegations and deny abuse ever occurred.<sup>243</sup> This characteristic of CSAAS creates a “lose-lose battle” for the accused.<sup>244</sup> “If the child *admits* sexual abuse, then the allegation is considered confirmed. If the child *denies* sexual abuse, then the allegation is *still* considered confirmed by concluding that the denial is

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<sup>241</sup> GARDNER, *supra* note 1, at 297; see Mark Steller & Tascha Boychuk, *Children as Witnesses in Sexual Abuse Cases: Investigative Interview and Assessment Techniques*, in CHILDREN AS WITNESSES 47, 47 (Helen Dent & Rhona Flin eds. 1992) (“[C]hild sexual abuse allegations . . . historically were dismissed as untrue.”).

<sup>242</sup> GARDNER, *supra* note 1, at 298.

<sup>243</sup> Summit, *supra* note 2, at 188.

<sup>244</sup> GARDNER, *supra* note 1, at 298.



merely a manifestation of the child being in the secrecy phase of the CSAAS.”<sup>245</sup> For an attorney defending the accused, this is really the main reason to fight the admission of CSAAS evidence against their client. The attorney should make vehement objections such as: “*Your honor, if this evidence comes in against Mr. Smith, we will not need to have the rest of the trial because your mind will already be made up. If evidence is presented that Jane said on multiple occasions that her father abused her, then Jane will be presented as an abuse victim. But if evidence is presented that Jane told her mother that her father abused her, but then told the social worker her father did not abuse her, then under CSAAS Jane is again presented as an abuse victim. Either way, Jane is automatically presented as an abuse victim. Mr. Smith should be able to expose the inconsistencies in Jane’s disclosure to her mother and the interviews with the social worker, but CSAAS will take away any benefit from that cross-examination.*”

*D. CSAAS Rejects Other Causes of Helplessness and Accommodation Emotions*

The fourth weakness with CSAAS lies with the “helplessness” and “accommodation” elements. According to CSAAS, child victims often have feelings of helplessness and rage. Summit explains that many of these children express these emotions through “self-hate, self-mutilation, suicidal behavior, promiscuous sexual activity and repeated runaways . . . .”<sup>246</sup> CSAAS does not, however, consider other explanations for the child’s rage or sense of helplessness.<sup>247</sup> In fact, there are many reasons a child may be angry; reasons “that have absolutely nothing to do with sex abuse,”<sup>248</sup> but everything to do with something else, such as their parents’ custody dispute.<sup>249</sup> A defense attorney must point out the inadequacy of these elements to the court. An attorney may argue, “*Your honor, CSAAS explains that if a child feels helpless or full of rage and acts out, she is more than likely expressing her rage after years of abuse. CSAAS, however, does*

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<sup>245</sup> *Id.* (emphasis in original).

<sup>246</sup> Summit, *supra* note 2, at 185.

<sup>247</sup> GARDNER, *supra* note 1, at 298-99.

<sup>248</sup> *Id.* at 299.

<sup>249</sup> Paquette, *supra* note 7, at 1424 (internal citation omitted) (“Emotions displayed by a child involved in a bitter custody dispute are similar to those emotions displayed by a sexually abused child.”).

*not consider any other reason the child may be helpless or angry. Perhaps she is feeling these emotions over this current custody dispute? For example, Jane may feel helpless because she is being treated “like a rope in a tug-of-war” between her two parents. Maybe she has been throwing temper tantrums to get her parents’ attention, not because she has been abused by Mr. Smith. Maybe she threw her book at her teacher last week because she is angry her parents are getting a divorce, not because she has been abused. Who knows? But what we do know is that there are many reasons Jane may be acting out, not just because she may have been abused.”*

### *E. CSAAS is Extremely Prejudicial*

Finally, the fifth weakness of CSAAS testimony is that it has little probative value and is highly prejudicial to the accused.<sup>250</sup> Under Rule 403 of the Federal Rules of Evidence, and its state counterparts, evidence may be inadmissible “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>251</sup> CSAAS “is not probative of abuse;”<sup>252</sup> it does not make the fact that the child was abused “more probable or less probable than it would have been without the evidence.”<sup>253</sup> Consequently, CSAAS testimony does not assist the fact-finder, and thus, is barely probative.<sup>254</sup> CSAAS testimony is, furthermore, highly prejudicial to the accused because of its misleading qualities.<sup>255</sup> For example, the symptoms of CSAAS are present in other syndromes<sup>256</sup> and may appear in children who have not been abused.<sup>257</sup> Additionally, children who have been abused sometimes do not show any of these characteristics.<sup>258</sup> Furthermore the “overwhelmingly

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<sup>250</sup> Gitlin, *supra* note 91, at 506.

<sup>251</sup> FED. R. EVID. 403.

<sup>252</sup> State v. J.Q., 617 A.2d 1196, 1209 (N.J. 1993) (citing Myers et al., *supra* note 30, at 67).

<sup>253</sup> Newkirk v. Commonwealth, 937 S.W.2d 690, 693 (Ky. 1996) (citing KY R. EVID. 401).

<sup>254</sup> *Id.*

<sup>255</sup> Gitlin, *supra* note 91, at 506.

<sup>256</sup> J.Q., 617 A.2d at 1203.

<sup>257</sup> Gitlin, *supra* note 91, at 506 (citing People v. Patino, 32 Cal. Rptr. 2d 345, 349 (Cal. Ct. App. 1994)) (“The concern of unfair prejudice to the defendant is particularly acute in child sexual abuse cases, because CSAAS evidence ‘can be highly prejudicial if not properly handled by the trial court . . . [since] the particular aspects of CSAAS are as consistent with false testimony as with true testimony.’”).

<sup>258</sup> O’Donohue, *supra* note 8, at 298.

persuasive nature of such testimony effectively dominat[es] the decision-making process” taking the power away from the fact-finder.<sup>259</sup> Therefore, “admitting CSAAS evidence during trial has resulted in nothing short of ‘widespread misunderstanding.’”<sup>260</sup> As a result, attorneys for the accused must object to CSAAS testimony on relevance grounds. They may consider saying: “*Your honor, CSAAS is not relevant under a 403 balancing test. First, CSAAS has little probative value as it does not detect abuse. In fact, the Supreme Court of Kentucky has described it as ‘generic and unreliable.’*<sup>261</sup> *It only describes common characteristics of abuse victims. For example, if Mrs. Smith proves that Jane has the characteristics of CSAAS, she has not proven anything, most especially not that Jane has been abused. Furthermore, these characteristics appear in children who have not been abused and are characteristics of many other syndromes. Thus, CSAAS evidence is just meant to mislead you and further prejudice Mr. Smith.*”

## V. CROSS EXAMINING EXPERT WITNESSES

Regardless of the above objections, in the majority states CSAAS evidence will most likely be admissible at the trial to explain why the child may have delayed in disclosing her abuse or why she may have recanted her story.<sup>262</sup> This is particularly the case in family court where the rules of evidence are relaxed.<sup>263</sup> In criminal cases involving accusations of child sexual abuse, such as those surveyed *supra*, the judges will take their gate-keeper role seriously before admitting CSAAS testimony since the stakes are so high—mandatory sentences and sexual offender registration;<sup>264</sup> in family court, however, judges are more likely to admit expert evidence on

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<sup>259</sup> Sanderson v. Commonwealth, 291 S.W.3d 610, 613 (Ky. 2009) (internal citation and quotations omitted).

<sup>260</sup> Gitlin, *supra* note 91, at 506 (citing Myers et al., *supra* note 30, at 68).

<sup>261</sup> Sanderson, 291 S.W.3d at 614.

<sup>262</sup> People v. Spicola, 947 N.E.2d 620, 635 (N.Y. 2011); State v. J.Q., 617 A.2d 1196, 1209 (N.J. 1993).

<sup>263</sup> See Hardin, *supra* note 227, at 179; see generally Newman, *supra* note 227 (generally explaining some of the unique rules in juvenile court including the admittance of testimony of “prior bad acts” to show propensity and hearsay evidence); e.g., Wash. Rev. Code Ann. § 9A.44.120 (West 2013).

<sup>264</sup> See STATE STATUTES RELATED TO JESSICA’S LAW, NATIONAL CONFERENCE FOR STATE LEGISLATURES, available at [http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs\\_Jessicas\\_Law\\_Summary.pdf](http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs_Jessicas_Law_Summary.pdf) (last visited Jan. 30, 2015); e.g., CONSEQUENCES FOR SEX OFFENSES AGAINST A CHILD IN VERMONT, available at [http://www.leg.state.vt.us/WorkGroups/sexoffenders/Sex\\_offense\\_penalty\\_chart.pdf](http://www.leg.state.vt.us/WorkGroups/sexoffenders/Sex_offense_penalty_chart.pdf) (last visited Jan. 30, 2015).

CSAAS in order to gain as much evidence as possible to make their custody and visitation determinations.<sup>265</sup> That is not to say that the stakes are not high in family court; a parent accused of sexually abusing his or her child could lose custody of the child, could be required to have only supervised visitation with the child, or could lose visitation all together.<sup>266</sup> Because this evidence is likely to come in, with a limitation as to its purpose, attorneys for the accused need to expect to lose their motion to exclude the expert testimony. As a result, they should be prepared to highlight the weaknesses of CSAAS testimony in their examination of the expert witness and be prepared to expand on these weaknesses in their opening and closing arguments.

#### A. “Battle of the Experts”

Once the motion to exclude the expert testimony on CSAAS is denied, the attorney of the accused parent must then seek to present an expert as well, creating a “battle of the experts.” Although the testimony, if admissible, will most likely only be used to rehabilitate the child, its inclusion is inherently accusatory. When the witness testifies to the common characteristics of an abused child, he or she is, in a way, saying that the child was probably abused if she has that characteristic.<sup>267</sup> For example, an expert witness may say, “*It is very common for a child who has been sexually abused to recant her allegations.*”<sup>268</sup> Because Jane has recanted, the judge may infer that she has been abused, despite the fact that the expert did not specifically say so.

In order to combat this type of testimony, the accused will also need an expert.<sup>269</sup> A good expert is one who believes in the accused parent’s case, has had substantial training, is a member of “professional societies,” has experience lecturing,

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<sup>265</sup> See generally *United States v. Frabizio*, 445 F. Supp. 2d 152, n.7 (D. Mass. 2006) (“Although the rules of evidence apply equally in civil and criminal cases, the Court must be especially vigilant in applying evidentiary rules in the criminal context, given the stakes for the defendant and the fact that, ultimately, the government bears the burden of proof beyond a reasonable doubt.”); see also *Barefoot v. Estelle*, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting) (“[W]hen a person’s life is at stake . . . a requirement of greater reliability should prevail.”).

<sup>266</sup> See generally *Paquette*, *supra* note 7, at 1420.

<sup>267</sup> *Newkirk v. Commonwealth*, 937 S.W.2d 690, 693 (Ky. 1996).

<sup>268</sup> *Summit*, *supra* note 3, at 190.

<sup>269</sup> *GOLDZBAND*, *supra* note 7, at 42 (“[T]he lawyer would probably want to use psychiatric evidence to support his position, and also to combat possible psychiatric evidence introduced by the opposition.”).

perhaps as a professor at a university, and is board certified.<sup>270</sup> The lawyer can search for these qualities by interviewing potential experts and reading each candidate's *curriculum vitae*.<sup>271</sup> Additionally the expert must have certain experience in the field of child sexual abuse in order to be qualified to testify:

The expert must possess specialized knowledge of child development, individual and family dynamics, patterns of child sexual abuse, the disclosure process, signs and symptoms of abuse, and the use and limits of psychological tests. The expert is familiar with the literature on child abuse, and understands the significance of developmentally inappropriate sexual knowledge. The expert is able to interpret medical reports and laboratory tests. The expert also is trained in the art of interviewing children, and is aware of the literature on coached and fabricated allegations of abuse. Of tremendous importance is the expert's clinical experience with sexually abused children.<sup>272</sup>

In order to combat CSAAS testimony, the accused's expert will need to point out the weaknesses in the study. For example, if the accusing parent's witness testifies to the common characteristics of CSAAS, the accused parent's expert witness must counter with other scientific evidence. For example, it is important to point out that other studies show that "there are no markers of abuse[; c]hildren who are sexually abused experience a wide range of symptoms . . . [and] there is no unique pattern of symptoms exhibited by the sexually abused child."<sup>273</sup> As a result, it will be important for the accused's expert witness's responses on direct examination to explain this by saying, "*There is no clear indicator of child sexual abuse, and there is no set of characteristics exhibited by all abused children. Some abused children show none of the symptoms, and some children who have not been abused show them all.*"<sup>274</sup> Additionally, it will be important to really drive home that CSAAS does not necessarily mean the child was abused. Consequently, the attorney for the accused should be sure to question the expert in such a way that he or she explains to the judge by testifying, "*The theory that a child has been abused because she has or does not have a characteristic of CSAAS is an improper use of CSAAS because CSAAS was never*

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<sup>270</sup> GOLDZBAND, *supra* note 7, at 55-59.

<sup>271</sup> *Id.*

<sup>272</sup> State v. J.Q., 617 A.2d 1196, 1202 (N.J. 1993) (quoting E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 284-85 (2d ed. 1992)).

<sup>273</sup> O'Donohue, *supra* note 8, at 298 (internal citations omitted); see State v. Rimmasch, 775 P.2d 388, 401 (Utah 1989) (internal citations omitted).

<sup>274</sup> O'Donohue, *supra* note 8, at 298 (internal citations omitted).

*meant to detect child abuse. Also, there are many other reasons that a child may be experiencing these characteristics, most of which probably stem from this custody dispute.”*

*B. Cross-Examination of the Accusing Parent’s Expert Witness*

Although the two experts should, in a way, cancel out each other, the attorney for the accused parent must still cross-examine the accusing parent’s expert witness by focusing on the weaknesses of CSAAS. The attorney must also remember to focus on the fact that CSAAS is a non-diagnostic tool that is not probative of abuse.<sup>275</sup>

The first step the defense attorney should take is to point out that this expert has no knowledge of whether the child was sexually abused by the accused parent since CSAAS is a nondiagnostic tool. Experts on CSAAS will be permitted to testify on common characteristics of sexually abused children, but not on individual victims.<sup>276</sup> On this cross-examination, the accused’s attorney must remind the trier of fact that this witness is not testifying about the child, but only general information. A defense attorney could ask the following questions: *“You testified on direct examination that you never interviewed Jane, correct? Rather, all you testified to is common characteristics of abused children, correct? And since CSAAS is not a diagnostic tool, you cannot definitively say whether or not Jane was sexually abused by Mr. Smith, correct? In fact, it would be an improper use of Dr. Summit’s research to state definitively whether a child was abused, isn’t that correct?”*

The next step the attorney for the accused parent should take is to point out how CSAAS is obsolete. Since sexual abuse allegations are no longer immediately dismissed, the pressures Summit describes that cause children to recant are no longer relevant.<sup>277</sup> As a result, it is important to point out that Jane recanted not because she felt pressure from society or from her mother. The attorney for the accused should consider asking the following questions of the expert: *“You testified on direct examination that after a child discloses his or her abuse, the child may recant because their biggest fears have come to life, correct? They feel that they have ruined their*

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<sup>275</sup> State v. Davis, 581 N.E.2d 604, 609 (Ohio 1989).

<sup>276</sup> See W.R.C. v. State, 69 So. 3d 933, 939 (Ala. Crim. App. 2010).

<sup>277</sup> GARDNER, *supra* note 1, at 297.

*families, correct? You testified that their mothers guilt them into recanting in order to save the family, correct? When Dr. Summit wrote his article, mothers and fathers were blaming their victim children for the hardships facing their families, correct? But this is no longer the case anymore, is it? Today, children are taught to immediately tell a teacher, parent, or coach if an adult touches them in any way. Isn't that correct? Aren't children programmed now to understand that if they report abuse that their parents will stand by to support them, to protect them? Aren't children told to report abuse to the police, no matter who the abuser is? Isn't it true the environment that Dr. Summit wrote his article in has disappeared?"*

Next, the attorney for the accused parent must clarify that the child's initial accusation was not "delayed" (Jane accused her father of abusing her for four weeks, but did not disclose until after the fourth week) to accommodate the abuse but rather was a false allegation. Summit believed that children delay their disclosure and do not seek help because they love their abusive parent and do not want to get their parent in trouble.<sup>278</sup> It is the job of the accused parent's attorney to point out that this is not necessarily true; that if abuse had truly happened, the child would have disclosed sooner. The attorney should lead the expert into saying there are other reasons the child may have accused her parent of sexual abuse after the fact because the allegation is fabricated. This is incredibly important because it is very possible that Jane is lying because Mrs. Smith has suggested or told her to lie, with hopes of keeping Mr. Smith from his daughter.<sup>279</sup> It is also possible that Jane wants to live with her mother, either on her own accord or because of her mother's suggestions, and as a result, is making up a story about her father.<sup>280</sup> Without intending to, parents can easily make suggestions to their children causing the children to make up false stories and accusations.<sup>281</sup>

To do this, the attorney should ask: "*You testified on direct examination that children may wait long periods of time*

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<sup>278</sup> Summit, *supra* note 2, at 186.

<sup>279</sup> O'Donohue, *supra* note 8; see Alexander, *supra* note 10.

<sup>280</sup> Paquette, *supra* note 7, at 1421 (citing Blush & Ross, *Sexual Abuse Allegations in Divorce: The SAID Syndrome*, in SEXUAL ABUSE ALLEGATIONS IN DIVORCE CASES 67, 82 (1988)) (footnote citation and quotation omitted).

<sup>281</sup> O'Donohue, *supra* note 8, at 302 (citing Poole, D.A., & Lindsay, D.S., *Interviewing Preschoolers: Effects of Nonsuggestive Techniques, Parental Coaching, and Leading Questions on Reports of Nonexperienced Events*, 60 EXPERIMENTAL PSYCHOL. 1, 129-54 (1995)).

*to disclose their abuse because they fear their allegations will be dismissed outright as lies, correct? And that these children would rather accommodate the abuse than face adults or the police who may not believe their allegations, correct? But as we just discussed, children today are taught to come to an adult immediately if another adult touches them, correct? Under that reasoning, we would expect Jane to tell someone that her father had abused her, wouldn't we? But Jane did not tell anyone her father had abused her, did she? She didn't tell her mother? She didn't tell her teacher? Her dance instructor? Her soccer coach? She didn't tell anyone she was being abused, did she? So isn't it possible that she did not delay disclosing her abuse because it just never happened? Couldn't it instead be possible that she made the allegations when she did because of other reasons? Isn't it possible that Mrs. Smith told Jane to make up this story? Isn't it possible that Mrs. Smith suggested to Jane that her father had harmed her? Isn't it possible that Jane just wants to be sure that she does not live with her father? And since CSAAS is not a diagnostic tool, you cannot be certain that there was a delayed disclosure rather than a fabricated allegation, can you?"*

Finally the last step the accused parent's attorney should take is to point out the issues with the "helplessness" and the "accommodation" elements. According to CSAAS, child victims often have feelings of helplessness and rage.<sup>282</sup> Because CSAAS does not consider other explanations for the child's rage or sense of helplessness,<sup>283</sup> the attorney for the accused parent must point out the other potential causes of the emotions, namely the custody dispute.<sup>284</sup> The attorney may consider asking the expert the following questions: *"You testified on direct examination that a child may experience feelings of helplessness and rage, correct? You said a child may harm herself, correct? She may cry, correct? She may lash out at school, correct? But there could be other reasons that a child lashes out at school correct? In fact, isn't it possible that a child whose parents are getting divorced may begin to act out in school? The child may be upset that one parent has left the marital house, correct? The child may be upset that she does not*

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<sup>282</sup> Summit, *supra* note 3, at 186.

<sup>283</sup> GARDNER, *supra* note 1, at 298-99.

<sup>284</sup> Paquette, *supra* note 8, at 1424 (citing Daniel C. Schman, *False Allegations of Physical and Sexual Abuse*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 5, 16 (1986)) ("Emotions displayed by a child involved in a bitter custody dispute are similar to those emotions displayed by a sexually abused child.").



*see the nonresidential parent that often, correct? The child may feel she is to blame for the breakup, correct? She may feel that she is a pawn in the parties' custody case, correct? She may feel that the visitation schedule is overwhelming, correct? In fact there are many reasons the child may act out in school, correct? And since CSAAS is not a diagnostic tool, you can't be sure that a child acting out in school has been sexually abused, can you?"* Thus, with each set of questions, the elements of CSAAS are combatted. When the accused parent's attorney uses these questions to point out the inconsistencies between what CSAAS stands for and the facts of reality, the judge will not automatically assume the child has been abused and will instead rely on the facts of the trial.

## CONCLUSION

CSAAS evidence may present huge obstacles for an attorney representing a client accused of sexually abusing his child during a custody dispute. The most challenging element is that CSAAS creates a "lose-lose" situation for the accused father.<sup>285</sup> It may seem that if CSAAS testimony is admitted into evidence, the accused father will automatically be found to have abused his daughter and he will lose all visitation rights.

The attorney, however, can rely on the weaknesses of CSAAS in order to still advocate for his client. First, the attorney should move to exclude any expert testimony on CSAAS. When arguing on the motion to exclude, attorneys for the accused parent should use CSAAS shortcomings to object to the admittance of expert testimony. If the judge admits expert testimony nonetheless, the attorney should cross-examine the expert witness pointing out all the vulnerabilities of CSAAS testimony. With these two steps, the attorney for the accused parent can not only vindicate his client, but also ensure that his client still has the opportunity to raise his daughter and watch her grow.

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<sup>285</sup> GARDNER, *supra* note 1, at 298.

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# National Security Whistleblowing vs. Dodd-Frank Whistleblowing

## FINDING A BALANCE AND A MECHANISM TO ENCOURAGE NATIONAL SECURITY WHISTLEBLOWERS

### INTRODUCTION

On June 14, 2013, five days after Edward Snowden revealed himself as the person who leaked classified documents to Glenn Greenwald, the United States filed a criminal complaint in the Eastern District of Virginia, charging Snowden with “theft, ‘unauthorized communication of national defense information,’ and ‘willful communication of classified communications intelligence information to an unauthorized person.’”<sup>1</sup> The recent release of scores of information regarding the surveillance programs of the National Security Agency (NSA) was first reported by Greenwald, a reporter at the British national newspaper, *The Guardian*.<sup>2</sup> Charging Snowden is reflective of an aggressive policy of the U.S. government to discourage whistleblowing about national security issues. Snowden began his whistleblowing in January 2013, when he reached out to a documentary filmmaker to discuss the extent of the NSA’s surveillance program.<sup>3</sup> In February 2013, Snowden contacted Greenwald to reveal what he knew.<sup>4</sup> Snowden then began sending secured documents that he had obtained through his work with Booz Allen Hamilton, a defense

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<sup>1</sup> Peter Finn & Sari Horwitz, *U.S. Charges Snowden with Espionage*, WASH. POST (June 21, 2013), [http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc\\_story.html](http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html).

<sup>2</sup> Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps In To User Data of Apple, Google and Others*, GUARDIAN (June 7, 2013), <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>.

<sup>3</sup> Ewen MacAskill, *Edward Snowden: How the Spy Story of the Age Leaked Out: The Full Story Behind the Scoop and Why the Whistleblower Approached the Guardian*, GUARDIAN (June 12, 2013), <http://www.theguardian.com/world/2013/jun/11/edward-snowden-nsa-whistleblower-profile>.

<sup>4</sup> *Id.*

contractor that was working for the NSA.<sup>5</sup> Some of the documents included information about the “Prism” program, which collects “information from the world’s leading technology companies”<sup>6</sup> about Internet communications, and a U.S. court order compelling Verizon to turn over phone records of American citizens.<sup>7</sup> Public reaction has been divided, with some touting Snowden as a hero and others calling him a traitor.<sup>8</sup> The government responded by filing the aforementioned charges against him for violations of the 1917 Espionage Act, as well as theft.<sup>9</sup> Currently, Snowden has been granted asylum for one year in Russia and has supposedly started a job helping to maintain a website there.<sup>10</sup>

The Obama Administration has brought charges for violations of the 1917 Espionage Act against national security whistleblowers with some frequency.<sup>11</sup> At least one of those

<sup>5</sup> Glenn Greenwald et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, GUARDIAN (June 11, 2013), <http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance?uni=Network%20front:network-front%20aux-1%20mini-bento:Bento%20box%208%20col:Position1:sublinks>.

<sup>6</sup> Ewen MacAskill, *Edward Snowden: How the Spy Story of the Age Leaked Out: The Full Story Behind the Scoop and Why the Whistleblower Approached the Guardian*, GUARDIAN (June 12, 2013), <http://www.theguardian.com/world/2013/jun/11/edward-snowden-nsa-whistleblower-profile>.

<sup>7</sup> *Id.*

<sup>8</sup> See Ariel Edwards-Levy & Sunny Freeman, *Americans Still Can't Decide Whether Edward Snowden is a 'Traitor' or 'A Hero,' Poll Finds*, HUFFINGTON POST (Oct. 30, 2013, 7:00 AM), [http://www.huffingtonpost.com/2013/10/30/edward-snowden-poll\\_n\\_4175089.html](http://www.huffingtonpost.com/2013/10/30/edward-snowden-poll_n_4175089.html) (reporting a poll that found 51% of Americans thought Snowden was “something of a hero” while 49% thought Snowden was “more of a traitor”); Robert Kuttner, *Time to Thank Edward Snowden*, HUFFINGTON POST (Nov. 10, 2013, 9:57 PM), [http://www.huffingtonpost.com/robert-kuttner/time-to-thank-snowden\\_b\\_4252208.html](http://www.huffingtonpost.com/robert-kuttner/time-to-thank-snowden_b_4252208.html) (arguing, as the title suggests, that we should and someday may be grateful for Snowden’s leaks despite their illegality because they sparked the conversation regarding the extent of America’s surveillance programs). Interestingly, Daniel Ellsberg, the whistleblower who released the Pentagon Papers, has joined the national dialogue regarding whether Snowden is a traitor or a hero. See *infra* Part I.A. In addition to praising Snowden for making these disclosures in a Washington Post editorial, most recently, Ellsberg took to the popular social news website Reddit.com to answer any questions users wanted to ask him. The title of the post and the beginning of the “thread” reads “I am Pentagon Papers leaker Daniel Ellsberg. Edward Snowden is my Hero. [Ask me Anything].” See Daniel Ellsberg, *Daniel Ellsberg: NSA Leaker Snowden Made the Right Call*, WASH. POST (July 7, 2013), [http://www.washingtonpost.com/opinions/daniel-ellsberg-nsa-leaker-snowden-made-the-right-call/2013/07/07/0b46d96c-e5b7-11e2-ae3f-339619eab080\\_story.html](http://www.washingtonpost.com/opinions/daniel-ellsberg-nsa-leaker-snowden-made-the-right-call/2013/07/07/0b46d96c-e5b7-11e2-ae3f-339619eab080_story.html); Daniel Ellsberg, *I am Pentagon Papers Leaker Daniel Ellsberg. Edward Snowden is My Hero*, AMA, REDDIT (Jan. 15, 2014), [http://www.reddit.com/r/IAMa/comments/1vahsi/i\\_am\\_pentagon\\_papers\\_leaker\\_daniel\\_ellsberg/](http://www.reddit.com/r/IAMa/comments/1vahsi/i_am_pentagon_papers_leaker_daniel_ellsberg/).

<sup>9</sup> Peter Finn & Sari Horwitz, *U.S. Charges Snowden with Espionage*, WASH. POST (June 21, 2013), [http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc\\_story.html](http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html).

<sup>10</sup> Alla Eshchenko, *Edward Snowden Gets Website Job in Russia, Lawyer Says*, CNN (Oct. 31, 2013), <http://www.cnn.com/2013/10/31/world/europe/russia-snowden-job/>.

<sup>11</sup> Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL’Y J. 51, 75-76 (2012).

cases involved prosecuting a whistleblower who disclosed information regarding wasted funds at the NSA—information which the Inspector General Report substantiated.<sup>12</sup> Notwithstanding the substantiated claims of the whistleblower, after a five year investigation, the whistleblower “pled guilty to a misdemeanor charge of ‘exceeding authorized use of a computer.’”<sup>13</sup> More recently, Private First Class Chelsea Manning (born Bradley Manning) was sentenced to 35 years in prison for charges under the Espionage Act for being the source of the WikiLeaks documents.<sup>14</sup> In total, President Obama has charged eight individuals with violations of the Espionage Act for leaking classified information, which is more than all other presidents combined.<sup>15</sup> It is for this reason that “[h]aving watched the Obama Administration prosecute whistleblowers at a historically unprecedented rate, [Snowden] fully expects the US government to attempt to use all its weight to punish him.”<sup>16</sup>

Now consider the recent Dodd-Frank legislation and the reward program for corporate whistleblowers who report corporate fraud and abuse to the Securities and Exchange Commission (SEC). On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) became law.<sup>17</sup> The Act was passed and signed into law by President Obama in “response to the 2008 financial crisis that tipped the nation into the worst recession since the Great Depression.”<sup>18</sup> One goal of Dodd-Frank is “to encourage whistleblower participation in the promotion of corporate governance.”<sup>19</sup> To date, the SEC has issued three whistleblower

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Luis Martinez & Steven Portnoy, *Bradley Manning Guilty on Most Charges, But Not Aiding Enemy*, ABC NEWS (July 30, 2013), <http://abcnews.go.com/Blotter/bradley-manning-guilty-charges-aiding-enemy/story?id=19797378>. Julie Tate, *Bradley Manning Sentenced to 35 Years in WikiLeaks Case*, WASH. POST (Aug. 21, 2013), [http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd\\_story.html](http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html).

<sup>15</sup> Daniel Politi, *Obama Has Charged More Under Espionage Act Than All Other Presidents Combined*, SLATE (June 22, 2013), [http://www.slate.com/blogs/the-slatest/2013/06/22/edward\\_snowden\\_is\\_eighth\\_person\\_obama\\_has\\_pursued\\_under\\_espionage\\_act.html](http://www.slate.com/blogs/the-slatest/2013/06/22/edward_snowden_is_eighth_person_obama_has_pursued_under_espionage_act.html).

<sup>16</sup> Greenwald et al., *supra* note 5.

<sup>17</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>18</sup> Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES (July 21, 2010), [www.nytimes.com/2010/07/22/business/22regulate.html?\\_r=0](http://www.nytimes.com/2010/07/22/business/22regulate.html?_r=0).

<sup>19</sup> Umang Desai, Comment, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 LOY. U. CHI. L.J. 427, 429 (2010).

awards.<sup>20</sup> The first award occurred within a year of Dodd-Frank becoming law and was in the amount of \$50,000 (or 30% of the judgment), while the second award, 15% of the \$7.5 million judgment, occurred recently in June 2013.<sup>21</sup> The most recent award was in the amount of \$14 million for information that resulted in an SEC enforcement action to recover investor funds.<sup>22</sup> Although only three awards have been given out, the SEC received 3001 tips in the Fiscal Year 2012, which is an average of about eight tips per day.<sup>23</sup> These statistics suggest that the whistleblower provisions of Dodd-Frank are at least minimally effective. But, regardless of the provision's effects, the message is clear: the U.S. government encourages whistleblowing within public companies.<sup>24</sup>

This note will examine the Dodd-Frank Act and related whistleblowing provisions that apply to the corporate world and the whistleblowing provisions in place within the government, especially as they pertain to the release of information related to national security. Upon examination, it will be clear that there is an inconsistency between the objectives of the different whistleblower provisions. It will also become evident that a different standard exists for public companies pursuant to Dodd-Frank that does not apply to the government itself. Under Dodd-Frank, the U.S. government policy objective is obvious: the federal government wants whistleblowers to report corporate wrongdoing that may result in financial losses to the SEC. Yet, when it comes to enabling government employees and contractors to blow the whistle on government perpetrated fraud or abuse, including possible violations of constitutional rights, the existing patchwork of federal legislation does little to provide a meaningful way for individuals to raise appropriate concerns without fear of retaliation or prosecution. This lack of a functional system within the government has arguably contributed to the leaking of confidential documents by Edward

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<sup>20</sup> Press Release, U.S. Securities and Exchange Commission, SEC Awards More than \$14 Million to Whistleblower (Oct. 1, 2013), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.UtlejHn0Bdg>; *see also* Erika Kelton, *SEC Whistleblower Rewards: Larger Ones Are Coming*, FORBES (June 26, 2013, 5:18 PM), <http://www.forbes.com/sites/erikakelton/2013/06/26/sec-officials-on-whistleblower-rewards-the-best-is-yet-to-come/>.

<sup>21</sup> Kelton, *supra* note 20.

<sup>22</sup> Press Release, *supra* note 20.

<sup>23</sup> U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM FISCAL YEAR 2012, at 4-5, 11 (2012), *available at* <http://www.sec.gov/about/offices/owb/annual-report-2012.pdf>.

<sup>24</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 748, 124 Stat. 1376 (2010).

Snowden. The Dodd-Frank whistleblower provisions, a more functional whistleblower system, have arguably prevented or addressed frauds reported as well as contributed to the development of more effective internal reporting mechanisms within companies.<sup>25</sup>

Drawing on the lessons from these inconsistencies, this note argues that the federal government should adopt a whistleblower scheme that is based on both the whistleblower provisions of the Dodd-Frank Act and the basic premise of checks and balances. Through Congress's power to create courts pursuant to Articles I and III of the Constitution,<sup>26</sup> a separate court should be created roughly based on the United States Foreign Intelligence Surveillance Court to respond to whistleblowers within the intelligence community. The new whistleblower court is certainly a starting point in an effort to balance both the interests of the United States citizen and the interests of an effective United States government and to provide an adequate solution to the age-old question of "who watches the watchers?"

Part I will discuss the relevant national security whistleblower laws as well as the relevant provisions of the Dodd-Frank Act. Part II will highlight the differences between the laws in both their structure and application. Finally, Part III will propose a new whistleblower court that is based on the Foreign Intelligence Surveillance Court to address the shortcomings of the national security whistleblower provisions. This new whistleblower court will adequately deal with the issues unique to national security, namely the need for secrecy, while still protecting individuals' rights.

## I. THE WHISTLEBLOWER PROVISIONS

Whistleblowers in the national security industry of the United States government face a more complex, unclear, and inhospitable landscape than their counterparts in the corporate world. There is an inherent tension between national security and whistleblower laws because of the secrecy demanded by national security.<sup>27</sup> The tension has been described as the need for a "private space" where the President and his advisors can make the best decisions without the pressures of public

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<sup>25</sup> See *infra* Part I.C.

<sup>26</sup> U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1.

<sup>27</sup> ROBERT G. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS 212 (2012).

scrutiny.<sup>28</sup> Despite this, “the Constitution promotes government transparency and Congressional oversight of the executive branch.”<sup>29</sup> The following discussion will summarize the whistleblower protections relevant to national security and the Dodd-Frank whistleblower provisions.

### A. *National Security Whistleblower Provisions*

One commentator described generally whistleblower protections in national security:

The laws affecting national security whistleblowers differ dramatically from general [whistleblower] provisions . . . [E]mployees may report misconduct related to national security to a more limited group of people, excluding most of Congress and all of the public. Moreover, less protection from retaliation exists, and the judicial branch has no oversight of retaliation claims because the claims are adjudicated administratively within the executive branch and often within the whistleblower’s own agency, if at all.<sup>30</sup>

The origins of whistleblower protection law reform can be traced to the Watergate scandal.<sup>31</sup> Daniel Ellsberg played a major role in the Watergate scandal and, as a result, has been described as “one of the best-known whistleblowers in US history.”<sup>32</sup> Daniel Ellsberg released what became known as the Pentagon Papers to two newspapers.<sup>33</sup> As a Rand Corporation employee, he contributed to a study conducted by Robert McNamara concerning United States involvement in Vietnam; the result was the highly critical Pentagon Papers.<sup>34</sup> Ellsberg released the Pentagon Papers first to the Senate Foreign Relations Committee in 1969 and then to the *New York Times* and the *Washington Post* in 1970.<sup>35</sup> After releasing the study to the newspapers, the federal government prosecuted him “for illegal possession of classified documents and a failure to return them to proper custody,” but the case was dismissed because, among other illegal activities, the executive branch was illegally spying on Ellsberg and his attorney, and executive branch employees broke into Ellsberg’s

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<sup>28</sup> Moberly, *supra* note 11, at 91.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 95-96.

<sup>31</sup> VAUGHN, *supra* note 27, at 72 (noting that “[w]ithout Watergate it is unlikely that Congress would have enacted the Civil Service Reform Act of 1978 (CSRA), and without that Act the whistleblower provision might have been delayed for years”).

<sup>32</sup> *Id.* at 73, 215-17.

<sup>33</sup> *Id.* at 73.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

psychologist's office.<sup>36</sup> President Nixon justified the illegal activity in the name of national security.<sup>37</sup> In response to the Watergate Scandal, Congress passed the Civil Service Reform Act of 1978 (CSRA)<sup>38</sup> and the Inspector General Act of 1978.<sup>39</sup> Both of these acts are considered "Watergate-reform legislation."<sup>40</sup>

The Inspector General Act of 1978 is a statutory scheme that offers protection to federal employee whistleblowers. The Inspector General Act "authorizes the inspectors general to receive and investigate complaints or information received from agency employees concerning a violation of law, rules, or regulations; mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to the public health and safety."<sup>41</sup> Unlike the other statutes discussed below, there is no exemption from protection for federal employees in the intelligence community.<sup>42</sup> For example, whistleblowers from the NSA and DIA (two intelligence community agencies under the Department of Defense)<sup>43</sup> are protected.

The law provides that the inspector general's office of the Department of Defense investigate complaints concerning fraud or abuse or other information revealed to them by whistleblowers.<sup>44</sup> Among other possible violations, a revocation of security clearance is grounds for an investigation into whether retaliation occurred.<sup>45</sup> There have been some successful investigations into retaliation for whistleblowers under this scheme.<sup>46</sup>

The CSRA created the Office of the Special Counsel (OSC), which is in charge of investigating allegations that a whistleblower was fired as retaliation.<sup>47</sup> The OSC has the power to remedy and

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<sup>36</sup> *Id.* at 73-74.

<sup>37</sup> *Id.* at 74.

<sup>38</sup> Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

<sup>39</sup> Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978).

<sup>40</sup> VAUGHN, *supra* note 27, at 217 (2012).

<sup>41</sup> Lindsay Boyd & Brian Futagaki, *Intelligent Whistleblowing*, J. OF PUB. INQUIRY, Spring/Summer 2010, at 20, 21, available at <https://www.ignet.gov/sites/default/files/files/sp10jpi.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> U.S., DEPT OF DEF., ORGANIZATION OF THE DEPARTMENT OF DEFENSE (DoD), available at [http://odam.defense.gov/Portals/43/Documents/Functions/Organizational%20Portfolios/Organizations%20and%20Functions%20Guidebook/DoD\\_Organization\\_March\\_2012.pdf](http://odam.defense.gov/Portals/43/Documents/Functions/Organizational%20Portfolios/Organizations%20and%20Functions%20Guidebook/DoD_Organization_March_2012.pdf).

<sup>44</sup> Boyd & Futagaki, *supra* note 41, at 21-22.

<sup>45</sup> *Id.* at 22.

<sup>46</sup> *Id.* at 22-23 (describing three instances of retaliation that were corroborated by the Department of Defense Office of Inspector General in the past three years).

<sup>47</sup> Lilyanne Ohanesian, *Protecting Uncle Sam's Whistleblowers: All-Circuit Review of WPA Appeals*, 22 FED. CIR. B.J. 615, 618 (2013).



punish accordingly any claims of retaliation.<sup>48</sup> Nevertheless, despite this big step for whistleblower protection from retaliation for government employees, the CSRA was largely ineffective.<sup>49</sup> Most importantly, the law was limited in scope; in particular, whistleblowers were not protected when it came to “information classified in the interests of national defense or foreign affairs.”<sup>50</sup> There was also no “legal protection [from retaliation] for many important disclosures by national security whistleblowers” because the CSRA excluded “the FBI, the CIA, the [DIA], the NSA, and other national security agencies.”<sup>51</sup> Further, the definition of “agency” in the CSRA excludes any agency whose function the President determines is “the conduct of foreign intelligence or counterintelligence activities.”<sup>52</sup> The practical effect of these exceptions is to carve out a large area where no protection exists—arguably where whistleblowing is needed most. The excluded agencies are granted broad authority, and the abuse of such power poses a threat to civil liberties. In practice, federal employees felt the law was hostile toward them; there were no cases brought on behalf of a whistleblower since the year of its passage, and contrary to the idea of whistleblower protections, the OSC revealed whistleblower identities after failing to investigate and prosecute claims.<sup>53</sup>

As a result of these failures, Congress responded by passing the Whistleblower Protection Act of 1989.<sup>54</sup> The purpose of the Act, as stated by Congress, “is to protect employees, *especially whistleblowers*, from prohibited personnel practices.”<sup>55</sup> The CSRA originally made it “illegal to retaliate against whistleblowers for making a disclosure that evidenced illegality or specified misconduct.”<sup>56</sup> Congress amended the language in the Whistleblower Protection Act by changing “a disclosure” to “any disclosure.”<sup>57</sup> Previously, the Court interpreted “a disclosure” to

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (stating that “the CSRA’s whistleblower protections proved a disappointment in the decade that followed [its enactment]”).

<sup>50</sup> VAUGHN, *supra* note 27, at 217.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 217-18; 5 U.S.C. § 2302(a)(2)(C)(ii) (2014).

<sup>53</sup> Ohanesian, *supra* note 47, at 618.

<sup>54</sup> Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16; Ohanesian, *supra* note 47, at 619.

<sup>55</sup> Whistleblower Protection Act § 2(b)(2)(A) (emphasis added).

<sup>56</sup> Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 551 (1999) (internal quotation marks omitted).

<sup>57</sup> 5 U.S.C. § 2302(b)(8)(A)-(B) (2012); Whistleblower Protection Act of 1989 § 4(a)(3).

allow for loopholes in which a whistleblower would not be protected after they blew the whistle.<sup>58</sup> For example, in *Fiorillo v. U.S. Dep't. of Justice, Bureau of Prisons*, the court held that the whistleblower's "primary motivation . . . must be the desire to inform the public on matters of public concern, and not personal vindictiveness"<sup>59</sup> and that the whistleblower's motives were related to personal vendettas and therefore not "a disclosure" protected by the act.<sup>60</sup> The amendment had the practical effect of "making protection mandatory whenever justified by the evidence in a disclosure."<sup>61</sup> As a result, disclosures, even when made for personal reasons rather than the desire to inform the public on matters of public concern, would qualify as "any disclosure" as long as they stated a claim substantively. Despite these improvements, the problems previously noted with the CSRA as it pertained to national security whistleblowers were not addressed in Congress's amendments. It was not until the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA)<sup>62</sup> that Congress addressed the issue of protecting national security whistleblowers. Congress's findings were that:

(5) the risk of reprisal perceived by employees and contractors of the Intelligence Community for reporting serious or flagrant problems to Congress may have impaired the flow of information needed by the intelligence committees to carry out oversight responsibilities; and

(6) to encourage such reporting, an additional procedure should be established that provides a means for such employees and contractors to report to Congress while safeguarding the classified information involved in such reporting.<sup>63</sup>

Under this law, intelligence community whistleblowers can now report to Congress but must report to the Office of the Inspector General (OIG) first, who then makes the determination whether it is credible enough to send to Congress.<sup>64</sup> However, according to Thomas Gimble, then-acting Inspector General of the Department of Defense in 2006, the ICWPA is a complete

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<sup>58</sup> See, e.g., *Fiorillo v. U.S. Dep't of Justice, Bureau of Prisons*, 795 F.2d 1544 (Fed. Cir. 1986) (holding that the personal motives of the whistleblower disqualified him from protection under the CSRA).

<sup>59</sup> *Id.* at 1550

<sup>60</sup> *Id.*

<sup>61</sup> Devine, *supra* note 56, at 551.

<sup>62</sup> Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, 112 Stat. 2413 (1998), available at <http://www.gpo.gov/fdsys/pkg/PLAW-105publ272/pdf/PLAW-105publ272.pdf>.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* § 702(a).

misnomer.<sup>65</sup> He contends that the Act more properly is a device that “protect[s] communications of classified information to the Congress from executive branch employees engaged in intelligence and counterintelligence activity.”<sup>66</sup> That is because there is no actual retaliation provision protecting a whistleblower who follows these procedures, but it does allow someone to communicate to Congress allegations of whistleblower retaliation.<sup>67</sup> At the time of Mr. Gimble’s comments, only three complaints had been made under the ICWPA.<sup>68</sup> Thus, the same recurring problem is faced by national security whistleblowers; that is, there is no protection from retaliation in the statutes for employees of the intelligence community.<sup>69</sup>

Finally, on October 10, 2012, President Obama issued Presidential Policy Directive Nineteen (PPD-19), which purports to prohibit retaliation against employees who serve in the intelligence community or “who are eligible for access to classified information” who report waste, fraud, and abuse.<sup>70</sup> This is an attempt to fill in the shortcoming of the ICWPA; that is, the lack of protection for a whistleblower who tries to report to Congress.<sup>71</sup> These protections, however, are practically nullified by the inclusion of the following text: “This directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.”<sup>72</sup> This means that there is no legal cause of action for a whistleblower who is fired, and the whistleblower has to depend on the previously discussed protections for redress.<sup>73</sup>

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<sup>65</sup> *National Security Whistleblower Protection: Hearing Before the Subcomm. on Nat’l Sec., Emerging Threats, and Int’l Relations of the H. Comm. on Gov’t Reform*, 109th Cong. 6-7 (2006) (statement of Thomas F. Gimble, Acting Inspector General of the U.S. Dep’t of Defense), available at [http://www.fas.org/irp/congress/2006\\_hr/021406gimble.pdf](http://www.fas.org/irp/congress/2006_hr/021406gimble.pdf).

<sup>66</sup> *Id.* at 7.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> 5 U.S.C. § 2302(a)(2)(C) (2012).

<sup>70</sup> Presidential Policy Directive-19, Protecting Whistleblowers with Access to Classified Information (Oct. 10, 2012), available at <https://www.fas.org/irp/offdocs/ppd/ppd-19.pdf>.

<sup>71</sup> Daniel D’Isidoro, *Protecting Whistleblowers and Secrets in the Intelligence Community*, NAT’L SEC. J. (Sept. 29, 2014), <http://harvardnsj.org/2014/09/protecting-whistleblowers-and-secrets-in-the-intelligence-community/>.

<sup>72</sup> Presidential Policy Directive-19, *supra* note 70.

<sup>73</sup> *National Security Whistleblowers Not Effectively Protected by New Whitehouse Directive: Directive Lacks Due Process and Real Legal Protections*, NAT’L WHISTLEBLOWERS CTR. (Oct. 11, 2012), [http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=1426&Item=229](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1426&Item=229)

Critics of PPD-19 argue that (1) “[t]he authority to protect the whistleblower is vested solely and absolutely with the [h]ead of the Agency that retaliated against the whistleblower;” (2) “[t]he Directive incorporates the ‘State’s Secrets’ privilege that permits agency heads to fire whistleblowers regardless of the Directive;” and, as previously discussed, (3) “[t]he Directive explicitly neglects to create any real legal protection.”<sup>74</sup> However, President Obama, regarding the Edward Snowden NSA leaks,<sup>75</sup> stated:

So the fact is, is that Mr. Snowden has been charged with three felonies . . . . If the concern was that somehow this was the only way to get this information out to the public, I signed an executive order well before Mr. Snowden leaked this information that provided whistleblower protection to the intelligence community—for the first time. So there were other avenues available for somebody whose conscience was stirred and thought that they needed to question government actions.<sup>76</sup>

Based on these comments, it seems that PPD-19 is at least a signal that the Obama Administration has recognized a need to respond to intelligence community whistleblowers and to create a workable whistleblower environment in the national security arena. Nevertheless, the current patchwork of legislation and executive action falls short and does not provide a clear path for the national security whistleblower who may perceive his or her only option as going to the press.

### *B. The Classification System*

National security whistleblowers are often left without any option but to go to the media.<sup>77</sup> Compounding this problem is the government’s use of the classification system. The classification system is used as both a shield and a sword for the

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<sup>74</sup> Stephen Kohn, *Where We Stand on President Obama’s “Policy Directive” On National Security Whistleblowers*, WHISTLEBLOWERS PROTECTION BLOG (Sept. 27, 2013), <http://www.whistleblowersblog.org/2013/09/articles/whistleblowers-government-empl/terrorism/where-we-stand-on-president-obamas-policy-directive-on-national-security-whistleblowers/#more>.

<sup>75</sup> See *infra* Part III.

<sup>76</sup> Joe Davidson, *Obama’s ‘Misleading’ Comment on Whistleblower Protections*, WASH. POST (Aug. 12, 2013), [http://articles.washingtonpost.com/2013-08-12/politics/41333716\\_1\\_edward-snowden-executive-order-policy-directive](http://articles.washingtonpost.com/2013-08-12/politics/41333716_1_edward-snowden-executive-order-policy-directive).

<sup>77</sup> Melissa Khemani, *The Protection of National Security Whistleblowers: Imperative but Impossible* 23 (Working Paper, May 30, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1412112](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412112) (describing the options left for national security whistleblowers as a result of the legal framework within which they report).

government when it comes to national security whistleblowers. It has been argued that the power of the executive branch to classify documents “seem[s] to be invoked more as a shield to cover up government incompetence or misconduct rather than to protect classified information or national security interests.”<sup>78</sup> At the same time, the executive branch’s power to revoke security clearances can be a sword in the sense that it is a form of retaliation used to punish whistleblowers.<sup>79</sup> The Supreme Court has strengthened the power to revoke security clearances as a result of its decision in *Department of the Navy v. Egan*.<sup>80</sup> The Court held that the Merit Systems Protection Board could not review the Department of the Navy’s reasons for revoking an employee’s security clearance that led to an employee’s discharge.<sup>81</sup> Accordingly, there is a “limitation placed on administrative and judicial review of the revocation of security clearances”<sup>82</sup> making it easier for security clearance revocation to be used as retaliation. The effects of having a security clearance revoked prevent an employee from advancing or even retaining a position in the federal government where such a clearance is required.

To summarize, the whistleblower provisions discussed above, when they do protect a whistleblower, rely primarily on internal reporting and monitoring. The mechanisms for protection are all internal “external” review boards; that is, the boards consist of executive branch employees who review the complaints of whistleblowers who may or may not have been unfairly removed from their post or had their security clearance revoked.<sup>83</sup> Additionally, when there is Congressional oversight, it is limited because the OIG screens the information before it reaches Congress pursuant to the ICWPA. The inspectors general are also internal “external” review mechanisms. The President appoints them “by and with the advice and consent of the Senate” and has the power to remove them with notice to Congress of his or her reasons for doing so.<sup>84</sup> Although few question that the inspectors general are capable of doing a fair and impartial job, it is noteworthy that the Government considers itself more prepared to handle internal reports from whistleblowers than a private corporation is, even when it comes to protecting U.S.

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<sup>78</sup> *Id.* at 20-21.

<sup>79</sup> VAUGHN, *supra* note 27, at 218-19.

<sup>80</sup> *Dep’t of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>81</sup> *Id.* at 525-33.

<sup>82</sup> VAUGHN, *supra* note 27, at 218.

<sup>83</sup> *See* Inspector General Act of 1978, Pub. L. No. 112-239, § 3(a)-(b), 92 Stat. 1101 (1978).

<sup>84</sup> *Id.*

citizens' constitutional rights. Further, the classification system and its possible manipulation by the government places added burdens on a potential national security whistleblower.

### C. *Dodd-Frank Whistleblower Provisions*

Two parts of the Dodd-Frank Act are relevant for purposes of this note. The first part is the bounty program. The Act reads, in pertinent part:

[T]he Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action . . . .<sup>85</sup>

The second part is the protection afforded the whistleblower in the Dodd-Frank Act. The Act provides that:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in making disclosures that are required or ordered under the Sarbanes—Oxley Act of 2002 . . . .<sup>86</sup>

The term “whistleblower” for purposes of the Dodd-Frank Act is defined as “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*.”<sup>87</sup> This distinction is important because Dodd-Frank has the effect of “limit[ing] its protections to those who report externally” to the government (not the press).<sup>88</sup> The implication of defining the whistleblower as someone who reports to the SEC is that anyone who only reports within their company, or internally, does not qualify for the bounties or the protections (although they may be protected under the Sarbanes-Oxley Act of 2002).<sup>89</sup>

Despite this narrow definition of “whistleblower,” another provision of Dodd-Frank purports to offer protection for whistleblowers who “mak[e] disclosures that are required or

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<sup>85</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(b)(1), 124 Stat. 1376 (2010).

<sup>86</sup> *Id.* § 922(h)(1)(A).

<sup>87</sup> *Id.* § 922(a)(6) (emphasis added).

<sup>88</sup> Harvard Law Review Association, *Corporate Law—Securities Regulation—Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 HARV. L. REV. 1829, 1832 (2011) [hereinafter HLRA, *Congress Expands Incentives*].

<sup>89</sup> *Id.*

protected under the Sarbanes-Oxley Act of 2002 . . . .”<sup>90</sup> According to the Harvard Law Review Association, this provision might cover whistleblowers who only report internally because the Sarbanes-Oxley Act (SOX Act) includes a provision that protects whistleblowers who report internally.<sup>91</sup> However, despite including this provision, the definition of “whistleblower” as someone who only reports to the SEC restricts the bounty awards and protections for whistleblowers in Dodd-Frank to those who report to the SEC.<sup>92</sup> This has the practical effect of excluding whistleblowers who only report internally from the bounty program and protections, therefore discouraging internal reporting.

Recently, the Fifth Circuit Court of Appeals had the opportunity to determine whether the Dodd-Frank Act protected whistleblowers who only reported internally.<sup>93</sup> In this case, the plaintiff, Khaled Asadi, reported to his supervisors at G.E. Energy (G.E.) that Iraqi officials believed G.E. had hired a woman associated with a particular Iraqi official in order to “curry favor with that official in negotiating a lucrative joint venture agreement.”<sup>94</sup> In interpreting the statute, the court found that the definition of whistleblower “expressly and unambiguously requires that an individual provide information to the SEC . . . .”<sup>95</sup> The court further found that the SOX Act provision within Dodd-Frank does not add another definition of whistleblower; rather, a whistleblower still has to report to the SEC to fall within the SOX Act provision of the Dodd-Frank Act.<sup>96</sup> This ruling is in contrast with other district courts faced with the same issue.<sup>97</sup>

More recently, the Southern District of New York found that because there is an ambiguity in the statute (created by the conflict between the definition of “whistleblower” as someone who reports to the SEC and the anti-retaliation provision not requiring the whistleblower to report to the SEC), it is appropriate to consider how the SEC interprets the

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<sup>90</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(h)(1)(A)(iii), 124 Stat. 1376 (2010).

<sup>91</sup> HLRA, *Congress Expands Incentives*, *supra* note 88, at 1832 n.31.

<sup>92</sup> *Id.* (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

<sup>93</sup> *See Asadi v. G.E. Energy (USA)*, L.L.C., 720 F.3d 620 (5th Cir. 2013).

<sup>94</sup> *Id.* at 621.

<sup>95</sup> *Id.* at 623.

<sup>96</sup> *Id.* at 627.

<sup>97</sup> *See, e.g., Kramer v. Trans-Lux Corp.*, No. 3:11cv1424, 2012 WL 4444820, at \*4 (D. Conn. Sept. 25, 2012); *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993-94 (M.D. Tenn. 2012).

statute.<sup>98</sup> The court found that the SEC interpreted the statute to “not require a report to the SEC in order to obtain whistleblower protection.”<sup>99</sup> So, unless and until the Supreme Court decides to hear this issue or the law is amended to fix the inconsistency in the definition of “whistleblower,” the Dodd-Frank Act will continue to highly discourage any type of internal reporting because the Act’s anti-retaliation provisions<sup>100</sup> will not protect the employee if they have not also reported to the SEC, and they will be ineligible for the bounty awards.

In sum, Dodd-Frank is effective at generating tips from whistleblowers for the SEC<sup>101</sup> in their pursuit of fixing what President Obama described as, “a crisis born of a failure of responsibility from certain corners of Wall Street to the halls of power in Washington.”<sup>102</sup> Specifically, the Act contributes to the solution by providing “clear rules and basic safeguards that prevent abuse, that check excess, that ensure that it is more profitable to play by the rules than to game the system.”<sup>103</sup> Since the Act was signed into law, three awards have already been distributed,<sup>104</sup> demonstrating that the whistleblower provisions of Dodd-Frank are having an impact on detecting and preventing financial abuses.

The objectives of the program are clear: vigorously protect whistleblowers and motivate whistleblowing to the government through monetary reward. The head of the SEC’s whistleblower office, Sean McKessy, said, “[q]uality information is the lifeblood of the program. If people think if they report wrongdoing they get fired or risk other retaliation, that well will dry up quickly.”<sup>105</sup> Despite the recent ruling in *Asadi v. G.E. Energy (USA), L.L.C.*,<sup>106</sup> McKessy believes “companies are generally investing more in internal compliance as a result of [the] whistleblower program” and “[t]he vast majority of people who come to [the SEC] about their current or former company

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<sup>98</sup> *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141, 147-48 (S.D.N.Y. 2013).

<sup>99</sup> *Id.*

<sup>100</sup> 15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii) (2010).

<sup>101</sup> U.S. SEC. & EXCH. COMM’N, *supra* note 23, at 4-5, 11.

<sup>102</sup> Press Release, White House, Statement by President Barack Obama Upon Signing H.R. 4173 (July 21, 2010).

<sup>103</sup> *Id.*

<sup>104</sup> Press Release, *supra* note 20; *see also* Kelton, *supra* note 20.

<sup>105</sup> Cheryl Soltis Martel, *SEC Whistleblower Office Preps for Additional Tips*, NACD DIRECTORSHIP (Aug. 24, 2012), <http://www.directorship.com/sec-whistleblower-office-preps-for-additional-tips/> (internal quotation marks omitted).

<sup>106</sup> *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).



do say they tried to report internally.”<sup>107</sup> For example, the recent payout of \$168 million dollars to an unspecified number of whistleblowers related to the settlement of Johnson & Johnson with the United States over “charges that J&J marketed drugs for unapproved uses and gave kickbacks to doctors and nursing homes.”<sup>108</sup> A robust internal reporting system could have been an effective remedy for Johnson and Johnson before it ever reached the point of negotiating a \$2.2 billion settlement. This example suggests that other companies will do as McKessy suggests and invest more in their internal reporting systems to prevent exorbitant losses.

## II. THE STRUCTURAL DIFFERENCES BETWEEN DODD-FRANK AND NATIONAL SECURITY WHISTLEBLOWING

The Dodd-Frank whistleblower structure encourages someone to go outside the company and report to the SEC (which, although independent, is a part of the executive branch) which then investigates the tip.<sup>109</sup> If the tip is credible enough, the SEC could bring an enforcement action against the company.<sup>110</sup> These claims have resulted in investigations, penalties, and bounty rewards in the millions of dollars against violating corporations.<sup>111</sup> Under Dodd-Frank, a whistleblower still receives protection from retaliation if they report internally (under the SOX Act), but there is less incentive to do this if in doing so the whistleblower becomes ineligible for the bounty.<sup>112</sup>

The national security whistleblower structure is less clear. Based on current events and the current state of the law,<sup>113</sup> the structure is almost exclusively internal (the exception being congressional oversight under the ICWPA, which is limited).<sup>114</sup> A flowchart diagramming the line from the

<sup>107</sup> Rachel Louise Ensign, *Q&A: Sean McKessy, Chief of the SEC's Office of the Whistleblower*, WALL ST. J. (Sept. 25, 2013), <http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-336403/>.

<sup>108</sup> Gregory Wallace, *\$168 Million Payout to Johnson & Johnson Whistleblowers*, CNN MONEY (Nov. 4, 2013, 5:04 PM), [http://money.cnn.com/2013/11/04/news/johnson-and-johnson-whistleblower-payout/index.html?hpt=hp\\_t2](http://money.cnn.com/2013/11/04/news/johnson-and-johnson-whistleblower-payout/index.html?hpt=hp_t2).

<sup>109</sup> U.S. SEC. & EXCH. COMM'N, *supra* note 23, at 5-6.

<sup>110</sup> See, e.g., Press Release, Securities and Exchange Commission, SEC Announces Whistleblower Action (June 12, 2013), *available at* <http://www.sec.gov/news/press/2013/2013-06-announcement.htm>.

<sup>111</sup> Kelton, *supra* note 20; Press Release, *supra* note 20.

<sup>112</sup> See, e.g., *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

<sup>113</sup> See *supra* Part I.B-C.

<sup>114</sup> Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, 112 Stat. 2413 (1998), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-105publ272/pdf/PLAW-105publ272.pdf>. Although it is not problematic for national security

national security whistleblower as she reports her complaint within the confines of the law is a straight line all the way up to the President with stops along the way in the relevant inspector general's office and the head of the agency where the whistleblower works. Conversely, the line for the Dodd-Frank whistleblower begins in the private sphere of the corporation and, with the exception of internal reporters (which Dodd-Frank discourages), goes outside the corporation and across to the public sphere of the SEC and thus up to the President.

These structural differences represent the tension discussed<sup>115</sup> between the President's need to protect national security information and the need to prevent abuses within the government by exposing fraudulent and abusive practices.<sup>116</sup> It might also be suggested that the government does not want to encourage whistleblowing when it is the subject of the whistleblower's allegations. Therefore, with this in mind, it is critical to try and address this tension while still allowing for an effective whistleblower culture within the national security community. Otherwise, we are left with major news headlines and scandals as would-be whistleblowers, perceiving themselves as without options (e.g., Edward Snowden), go to the press. A scandal never looks good, but it is also possible that these leaks to the press have caused serious, real damage. Members of Congress say that a recent Pentagon report suggests that Snowden's leaks "have set back U.S. efforts against terrorism, cybercrime, human trafficking, and weapons proliferation."<sup>117</sup>

Corporations and the government are similar enough that corresponding structures should and could be applied to both effectively. Corporations and government share four important characteristics that make them agreeable to similar whistleblower provisions. First, shareholders of the corporation are similar to citizens of the government.<sup>118</sup> Both shareholders and citizens generally have a right to vote on important matters ranging from leadership to amendments of bylaws<sup>119</sup> and state

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whistleblowers to begin whistleblowing internally considering the sensitive nature of protecting our national security (after all even SOX protects internal whistleblowers), the problem is national security whistleblowers are not even protected at any preliminary, internal stage, arguably leaving them with little to no options but to go to the press.

<sup>115</sup> See *supra* Part I.A.

<sup>116</sup> VAUGHN, *supra* note 27, at 212.

<sup>117</sup> Ken Dilanian & Richard A. Serrano, *Snowden Leaks Severely Hurt U.S. Security, Two House Members Say*, L.A. TIMES (Jan. 9, 2014), <http://articles.latimes.com/2014/jan/09/nation/la-na-snowden-intel-20140110>.

<sup>118</sup> See, e.g., U.S. CONST. art. I-III; DEL. CODE ANN. tit. 8, §§ 141-142, 146 (2010).

<sup>119</sup> See, e.g., DEL. CODE ANN. tit. 8, § 109.

and federal constitutions. Second, the CEO of the corporation is analogous to the President of the government.<sup>120</sup> The CEO is responsible for the day-to-day operations of the corporation much like the President has control over the executive branch and its day-to-day operations. Third, the board of directors of the corporation is very similar to Congress.<sup>121</sup> Both have oversight powers. Fourth, the Judiciary serves similar functions to both the corporation and the government.<sup>122</sup>

In practice, both corporations and the government have similar hierarchical organizational and reporting structures. As a result, the whistleblowing employee in both organizations is faced with the same challenges. Their direct supervisors and those above them may be involved in the concerning conduct. The risk of retaliation through demotion or termination is the same for both. The consequences of the wrongful conduct directly affect the principal stakeholders in both organizations, shareholders in the case of corporations and citizens in the case of the government. Both organizations should have the same objective of promoting lawful conduct by its employees, including its leadership. Whether the offending conduct is accounting fraud or the violation of constitutional rights, both are worthy of prevention. Protection from retaliation and whistleblowing incentives are appropriate tools to motivate appropriate conduct by both organizations. Of course, where issues of national security are involved, the process must take into account the need for a potentially higher level of confidentiality.

### III. A NEW WHISTLEBLOWER COURT

The Foreign Intelligence Surveillance Court (FISC) is a workable, constitutional way for the government to obtain prior judicial approval to engage in surveillance. The purpose of the FISC is to balance the government's need to investigate and seek out national security threats with the rights of individuals by gaining judicial approval first.<sup>123</sup> A whistleblower court would balance these same needs, and a court like the FISC is a working model upon which to base the whistleblower court.

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<sup>120</sup> See, e.g., U.S. CONST. art. I-III; DEL. CODE ANN. tit. 8, §§ 141-142, 146.

<sup>121</sup> See, e.g., U.S. CONST. art. I-III; DEL. CODE ANN. tit. 8, §§ 141-142, 146.

<sup>122</sup> See, e.g., U.S. CONST. art. I-III; DEL. CODE ANN. tit. 8, §§ 141-142, 146.

<sup>123</sup> Federal Judicial Center, *History of the Federal Judiciary: Foreign Intelligence Surveillance Court* (Jan. 13, 2013), [http://www.fjc.gov/history/home.nsf/page/courts\\_special\\_fisc.html](http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html).

A. *The Foreign Intelligence Surveillance Court*

Congress approved the creation of the FISC pursuant to its Article III power.<sup>124</sup> The FISC was created pursuant to the Foreign Intelligence Surveillance Act (FISA).<sup>125</sup> First, the Chief Justice of the United States Supreme Court appointed “11 district court judges from at least seven of the United States judicial circuits.”<sup>126</sup> In the FISC, any time a judge denies an application for an order of surveillance, that judge must write an opinion that is filed under seal.<sup>127</sup> FISA also creates a review court for the FISC consisting of “three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals” to review denials of applications, subject to Supreme Court review.<sup>128</sup>

In order to obtain an order of surveillance, (1) the lawyers from the Department of Justice prepare an application for surveillance on behalf of the agency requiring the order, which is submitted to the FISC, (2) the FISC either approves or denies the application (since 1979 only 11 out of 33,946 have been denied),<sup>129</sup> and (3) the applying agency executes the surveillance, which ultimately may or may not lead to criminal prosecution.<sup>130</sup> The applications by the government and their contents are classified.<sup>131</sup>

In *United States v. Cavanagh*, the Ninth Circuit upheld the constitutionality of the FISC, holding that it did not violate Article III of the Constitution.<sup>132</sup> First, the court dismissed the plaintiff’s argument that because the FISC judges are not tenured for life with fixed salaries, it violates Article III.<sup>133</sup> The court then dismissed the plaintiff’s argument that the surveillance applications need to be “passed upon by [A]rticle III judges” because “the judges assigned to serve on the FISA court are federal district judges, and as such they are insulated from political pressures by virtue of the protections they enjoy

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<sup>124</sup> STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 593 (5th ed. 2011).

<sup>125</sup> 50 U.S.C. § 1801 et seq. (2010).

<sup>126</sup> *Id.* § 1803(a)(1).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* § 1803(b).

<sup>129</sup> Todd Lindeman, *The Foreign Intelligence Surveillance Court*, WASH. POST (June 7, 2013 11:53 PM), [http://www.washingtonpost.com/politics/the-foreign-intelligence-surveillance-court/2013/06/07/4700b382-cfec-11e2-8845-d970ccb04497\\_graphic.html](http://www.washingtonpost.com/politics/the-foreign-intelligence-surveillance-court/2013/06/07/4700b382-cfec-11e2-8845-d970ccb04497_graphic.html).

<sup>130</sup> DYCUS ET AL., *supra* note 124, at 594.

<sup>131</sup> Lindeman, *supra* note 129.

<sup>132</sup> 807 F.2d 787 (9th Cir. 1987).

<sup>133</sup> *Id.* at 791.

under [A]rticle III.”<sup>134</sup> Moreover, “[A]rticle III courts are not foreclosed from reviewing the decisions of the [FISC].”<sup>135</sup> Next, the court rejected the proposition that the temporary assignment to the court implicates “the principles of judicial interpretation and separation of powers that underlie [A]rticle III.”<sup>136</sup> The court found that the “temporary designation within the federal judicial system has never been thought to undermine the judicial independence that [A]rticle III was intended to secure.”<sup>137</sup> Finally, the court rejected the argument that Article II of the Constitution was violated by having the Chief Justice of the Supreme Court appoint the judges to the FISC stating that “temporary assignment of a federal district judge to another district did not violate the President’s appointment power under the Constitution.”<sup>138</sup> Therefore, with these basic provisions in place and approved by at least the Ninth Circuit, a similarly structured national security whistleblower court should have an appropriate and constitutional basis.

### B. *The Whistleblower Court*

The national security whistleblower court would structurally mirror the FISC. It would consist of 11 judges, appointed by the Chief Justice of the United States Supreme Court. A review court would consist of three judges to review dismissal of whistleblower complaints. In support of the staffing structure of the whistleblower court, it is useful to consider the staff and amount of complaints handled by the SEC’s Office of the Whistleblower. The staff of the SEC’s Office of the Whistleblower consists of nine attorneys and three paralegals in addition to the head of the office, Mr. McKessy, and the deputy chief of the office, Ms. Jane A. Norberg.<sup>139</sup> During the fiscal year 2013, the Office of the Whistleblower received 3238 tips (a 7.9% increase from fiscal year 2012).<sup>140</sup> Considering the success of the Office of the Whistleblower in addressing and investigating over 3000 complaints, it is very likely the whistleblower court would be more than capable to handle complaints of this volume.

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 791-92.

<sup>137</sup> *Id.* (internal citations omitted).

<sup>138</sup> *Id.* (citing *Lamar v. United States*, 241 U.S. 103, 118 (1916)).

<sup>139</sup> U.S. SEC. & EXCH. COMM’N, *supra* note 23, at 5.

<sup>140</sup> *Id.*

If any change would be made to the number of whistleblower court judges, then it would likely be to increase the whistleblower court staff because there were more Dodd-Frank Act whistleblower tips than there were applications to the FISC (the FISC received between 1750 and 2000 applications for orders of surveillance in the year 2012).<sup>141</sup> Further, there are complaints that the FISC is a “rubber stamp” because it overwhelmingly approves government applications for orders of surveillance.<sup>142</sup> Therefore, any reduction in staff might call into question the legitimacy of the process of the whistleblower court; that is, the process might be considered suspect if there are a large amount of complaints and an even smaller amount of staff than the FISC.

The process by which whistleblowers in the intelligence community would be heard in this new court is relatively straightforward and simple. First, a whistleblower would file a complaint, much like a plaintiff in a civil lawsuit. The complaint would be similar to those in the Inspector General Act,<sup>143</sup> detailing any “violation of law, rules, or regulations; or mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to the public health and safety.”<sup>144</sup> The phrase “intelligence community” would be defined the same way that the National Security Act of 1947 defined the term to include various intelligence agencies.<sup>145</sup> This includes the Office of the Director of National Intelligence, the CIA, the NSA, the DIA, the National Geospatial-Intelligence Agency, and the National Reconnaissance Office, among others.<sup>146</sup> Additionally, intelligence community contractors would be covered as in PPD-19.<sup>147</sup> PPD-19 included supposed protection for those “who are eligible for access to classified information.”<sup>148</sup> In 2010, “out of 854,000 people with top secret clearances, 265,000 [we]re contractors.”<sup>149</sup>

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<sup>141</sup> Lindeman, *supra* note 129.

<sup>142</sup> Dina Temple-Raston, *FISA Court Appears to be Rubber Stamp for Government Requests*, NAT’L PUB. RADIO (June 13, 2013, 4:00 AM), <http://www.npr.org/2013/06/13/191226106/fisa-court-appears-to-be-rubberstamp-for-government-requests>.

<sup>143</sup> See 5 U.S.C. app. § 7(a) (1978), available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-app-inspector-sec7.pdf>.

<sup>144</sup> Boyd & Futagaki, *supra* note 41, at 21 (citing 5 U.S.C. app. § 7 (2012)).

<sup>145</sup> See Moberly, *supra* note 11, at 72 n.129 (citing 50 U.S.C. § 401a(4) (2012)).

<sup>146</sup> *Id.* at 72-73.

<sup>147</sup> Presidential Policy Directive-19, *supra* note 70.

<sup>148</sup> *Id.*

<sup>149</sup> Dana Priest & William M. Arkin, *National Security Inc.*, WASH. POST (July 20, 2010, 12:24 AM), <http://projects.washingtonpost.com/top-secret-america/articles/national-security-inc/>.

Any employee or contractor of the intelligence community with any complaint that is enumerated in the Inspector General Act could submit a complaint to the court. At the same time that the complaint is submitted to the whistleblower court, the complaint should be submitted to the Inspector General office of the relevant agency. This notifies the agency that there is a complaint, and this allows them to investigate the claim. All of the intelligence community agencies enumerated in the National Security Act of 1947 have an Inspector General office.<sup>150</sup> This would obviate the need to create any new department within an agency to address whistleblower complaints.

It may seem that by inserting a whistleblower court into the process this note is creating a middle man; however, in the national security context, where whistleblowing is treated generally with “outright hostility[,]”<sup>151</sup> at least under the Obama Administration, it is necessary to add a layer of protection for the whistleblower. This is achieved by inserting the independent judiciary into the process. Such a court addresses the tension between the executive’s compelling interest in national security and the interest of the public in transparency. In this case, the phrase “transparency” is a misnomer because the whistleblower court would be under seal and thus not transparent in the traditional sense of the word. Nevertheless, by including another branch of the government in the process, the judiciary, the potential for abuse and the concentration of power to address whistleblower complaints in the executive is very much limited. Additionally, filing under seal to the judiciary is not a new process because sealing different stages of the judiciary process occurs with enough frequency that there exists a guide on how to do it.<sup>152</sup>

Just as in ordinary litigation, the relevant inspectors general office has the opportunity to respond to the complaint, which it would submit to the whistleblower court. It is important to note that there would be no jury trial. Rather, it would be much more in line with a bench trial, with the judges playing the role of fact finder. The inspectors general’s investigation, in line with

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<sup>150</sup> See Council of the Inspectors General on Integrity and Efficiency, *Inspectors General Directory & Homepage Links*, <http://www.ignet.gov/igs/homepage1.html> (last visited Oct. 30, 2013).

<sup>151</sup> Moberly, *supra* note 11, at 73.

<sup>152</sup> See, e.g., Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide*, FED. JUDICIAL CTR. (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Sealing\\_Guide.pdf/\\$file/Sealing\\_Guide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Sealing_Guide.pdf/$file/Sealing_Guide.pdf) (describing the different aspects of the judiciary as they related to being put under seal including national security issues).

their traditional role of neutral investigator,<sup>153</sup> should present to the whistleblower court its findings regarding the whistleblower's complaint. The whistleblower court, having the information necessary to make a decision on the merits of the complaint, would then decide whether or not there is a real issue raised by the complaint. This differs from the usual role of the courts deciding whether someone has a "winning" claim. But this difference is in line with the function of whistleblowing; that is, to seek out and prevent or fix abuses.

Next, there are two possible outcomes for the whistleblower's complaint. First, if the whistleblower court finds, after consideration of the inspectors general's investigation and the whistleblower's complaint, that no "violation of law, rules, or regulations; or mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to the public health and safety"<sup>154</sup> has been made out, then the complaint will be dismissed. Second, if the whistleblower court does find that there is a real allegation, then the best process forward would be a collaborative effort to redress the complaint, including input from the whistleblower court and its staff, the inspectors general's office and their staff, and the original whistleblower, either pro se or represented by counsel.<sup>155</sup> In this way, the whistleblower court would be able to collaboratively make a determination as to the best remedy of the complaint after considering the input from the inspectors general office, the whistleblower, and the court.

As an example, if Snowden were to decide that he does not like the extent of the NSA surveillance program and believes that it is a complete overstepping of the executive's power, he can file a complaint with as much detail as possible and submit it to the whistleblower court for consideration. This would be in lieu of going to *The Guardian* news outlet and then fleeing the United States for fear of prosecution. One possible

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<sup>153</sup> Inspector General Act of 1978, Pub. L. No. 112-239, § 2, 92 Stat. 1101, available at <http://www.ignet.gov/pande/leg/igactasof1010.pdf> (describing the purpose as "to create independent and objective units").

<sup>154</sup> Boyd & Futagaki, *supra* note 41, at 21 (citing 5 U.S.C. App. § 7 (2012)).

<sup>155</sup> This process is being used by the newly created New York State Human Trafficking Courts. Recognizing that many people arrested for prostitution are likely victims of human trafficking who need help rather than to be punished, the new court is a "collaborative effort[ ] of the court system's criminal justice partners, service providers across the state and other stakeholders . . . where [the victim] will be evaluated by the judge, defense attorney and prosecutor." Press Release, New York State Unified Court System, NY Judiciary Launches Nation's First Statewide Human Trafficking Intervention Initiative (Sept. 25, 2013), available at [http://www.nycourts.gov/press/PR13\\_11.pdf](http://www.nycourts.gov/press/PR13_11.pdf). In this way, the best result regarding the issue at stake is reached.



complication in Snowden's case is the fact that he is employed by Booz Allen rather than the NSA. The whistleblower court, however, in addition to hearing complaints from government employees, would also hear complaints from people who work for government contractors.

Next, the whistleblower court would read through the complaint and send it to the NSA Office of the Inspector General (OIG) so that it can begin its investigation. In due time, the OIG completes its investigation of the surveillance being conducted and gives the whistleblower court its analysis of the issues raised in the complaint. Much like the debate going on today, the whistleblower court would consider whether what Snowden revealed is a violation of the law. Although it may seem that the whistleblower court would have to undertake the strenuous task of deciding if the NSA's conduct is illegal, the complaints can also be considered under the Inspector General Act's standard, which includes complaints relating to "a substantial and specific danger to the public health and safety."<sup>156</sup> This broadens the whistleblower court's analysis by considering, along with the inspectors general and the whistleblower, the potential harm that the practices would have on the public's health and safety.

The legal issue regarding the surveillance has been considered by the FISC in the past at least once, and there have also been two district court opinions relating to the NSA's surveillance program. The FISC opinion that was declassified with redactions, written by Judge John Bates, revealed that the FISC did find the NSA surveillance program improper.<sup>157</sup> After the government made improvements to their applications by fixing the problems noted by Judge Bates, the FISC approved the program once again.<sup>158</sup> But there is now a split in the district courts about the constitutionality of the NSA surveillance program. First, in *Klayman v. Obama*,<sup>159</sup> the District Court for the District of Columbia ruled that the surveillance "almost certainly"

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<sup>156</sup> 5 U.S.C. app. § 7(a) (2012), available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-app-inspector-sec7.pdf>.

<sup>157</sup> See Judge Bates's Opinion on N.S.A. Program, United States Foreign Intelligence Surveillance Court 32 available at <http://www.fas.org/irp/agency/doj/fisa/fisc0912.pdf> (last visited Jan. 3, 2015) (finding that the minimization procedures used by the government in the collection of data were inadequate to protect citizens); Charlie Savage & Scott Shane, *Secret Court Rebuked N.S.A. on Surveillance*, N.Y. TIMES (Aug. 21, 2013), [http://www.nytimes.com/2013/08/22/us/2011-ruling-found-an-nsa-program-unconstitutional.html?pagewanted=1&\\_r=0](http://www.nytimes.com/2013/08/22/us/2011-ruling-found-an-nsa-program-unconstitutional.html?pagewanted=1&_r=0).

<sup>158</sup> Savage & Shane, *supra* note 157.

<sup>159</sup> *Klayman v. Obama*, No. 13-0881 (R.JL), 2013 WL 6598728 (D.D.C. Dec. 16, 2013).

violated a reasonable expectation of privacy under the Fourth Amendment.<sup>160</sup> Closely following the *Klayman* decision, the Southern District of New York ruled that the NSA surveillance was not only constitutional but that it was also “the Government’s counter-punch: connecting fragmented and fleeting communications to re-construct and eliminate al-Qaeda’s terror network.”<sup>161</sup> Given the different opinions reached in the two courts, it is possible that the Supreme Court could end up hearing the case.<sup>162</sup> The constitutionality of the surveillance program is beyond the scope of this note, but the fact that the FISC and two district courts are in disagreement with the government and each other over whether the surveillance is proper, it almost certainly could be argued it poses a substantial danger to public health and safety.

In addition to the legal analysis, the whistleblower court could make recommendations to the NSA and the executive branch or even permit legal action to be taken against the NSA, much like the SEC can bring actions against corporations that are violating laws or regulations. The whistleblower court could also issue opinions similar to the Judge Bates opinion, discussed above, finding that the NSA surveillance was improper, if the whistleblower’s complaint warranted such a finding.<sup>163</sup>

### C. *Merits and Drawbacks of a Possible Whistleblower Complaint Court*

The whistleblower court would enable someone like Snowden to proceed through channels that adequately balance the national security issues with the transparency, checks, and balances required to run an efficient government. Some of the drawbacks are exemplified by the Snowden example as well. The main problem is what the whistleblower court does with the information it hears. Does it have the authority to intervene and order the government to do anything? Considering that the FISC has the authority to deny or approve surveillance applications, it is likely that the whistleblower court would be able to issue orders to the offending government agency. The answer to this question may in fact improve the legitimacy and effectiveness of

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<sup>160</sup> *Id.* at \*19.

<sup>161</sup> *Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724, 757 (S.D.N.Y. 2013).

<sup>162</sup> Orin Kerr, *Will the Supreme Court Review the NSA’s Telephony Metadata Program?*, THE VOLOKH CONSPIRACY (Jan. 2, 2008, 8:47 PM), <http://www.volokh.com/2014/01/02/supreme-court-take-bulk-telephony-case-circuit-courts-dont-invalidate-program/>.

<sup>163</sup> See Judge Bates’s Opinion on N.S.A. Program, *supra* note 157, at 31.

the whistleblower court. If Congress creates the whistleblower court as it did the FISC, then it can find the appropriate balance between the whistleblower court's new power and the executive's existing power. This adds to the legitimacy of the court and of the whistleblowing process as a whole because now all three branches of the government are represented and active in the process. With the three branches having input, the proper amount of checks and balances will be effective to ensure that the new whistleblower court does not exert too much control over the executive and that the executive is not dangerously untethered in its clearly legitimate goal and responsibility of providing for the national security of the United States.

There could also be the issue of whether the national security whistleblower needs to exhaust internal reporting mechanisms available to her. If it appears that requiring exhaustion of remedies is too onerous for the national security whistleblower, this suggests that requiring exhaustion before filing a complaint is not a good idea. In fact, requiring exhaustion would give the current government whistleblower apparatus control over whether the complaint ever makes it to the whistleblower court. For example, in the ICWPA, the complaint only went to Congress if the Office of the Inspector General deemed it credible. Therefore, requiring exhaustion would likely have the same effect and is thus not advisable.

There are still other considerations that would need to go into the formation of the whistleblower court. For instance, what kind of standard would be used to decide whether a complaint should be dismissed? These types of questions would best be answered in practice. The whistleblower court would create its own jurisprudence and precedent as issues arise.

One thing is certain: the whistleblower court (rather than a leak to the media) is a much more appropriate and efficient way to expose government wrongdoings. Attorney General Eric Holder said that "the mechanisms that [Snowden] used' to publicize his concerns with the government's surveillance aren't 'worthy of clemency.'"<sup>164</sup> Nonetheless, he admitted that "Snowden sparked a necessary conversation."<sup>165</sup> This conversation has resulted in President Obama "announc[ing] the end of the telephone metadata program, the way it exists now, after the

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<sup>164</sup> Evan Perez & Leigh Ann Caldwell, *CNN Exclusive: Holder Fears 'Lone Wolf' Terrorist Attack, Doesn't Want TSA Armed*, CNN (Nov. 6, 2013), [http://www.cnn.com/2013/11/05/politics/holder-terror-snowden-interview/index.html?hpt=hp\\_t2](http://www.cnn.com/2013/11/05/politics/holder-terror-snowden-interview/index.html?hpt=hp_t2).

<sup>165</sup> *Id.*

disclosure of the practice by the former National Security Agency contractor Edward J. Snowden.”<sup>166</sup> The obvious question then, is how would this conversation have been started if Snowden did not do what he did? This is the role that the whistleblower court would play. It would, at least when the public health and safety is concerned, start the conversation. It is true that the whistleblower court would be under seal but, at a certain point, the findings, much like the announcements of the SEC’s actions after investigating whistleblower tips, would be made public to the extent the information did not endanger national security. At worst, if the whistleblower court found itself in a gray area such as the legality of the NSA’s surveillance program, then it could have begun the conversation by notifying Congress through the appropriate channels.

Importantly, the whistleblower court begins to look more like the Dodd-Frank Act provisions that the executive branch has fully embraced and encouraged. Reverting back to the flowchart,<sup>167</sup> the national security whistleblower’s complaint no longer goes straight up to the President. Rather, it now looks much more like the Dodd-Frank Act whistleblower’s line, which begins in the private sphere and goes outside the corporation, across to the SEC, and thus up to the President. The national security whistleblower’s complaint now goes outside the internal structure of the executive branch of the government and into the judiciary that was legislated by Congress. From there, the judges and other parties concerned have a much better chance at resolving any issues that may exist.

## CONCLUSION

A whistleblower court would push the executive branch toward the middle of a spectrum that has at one end the Dodd-Frank Act whistleblowing apparatus, which highly encourages the practice, and at the opposite end, the Obama Administration prosecuting whistleblowers under the 1917 Espionage Act. Although not enjoying the robust protections and the monetary rewards that corporate whistleblowers have under the Dodd-Frank Act, national security whistleblowers will no longer need to disclose confidential information to the public because of the ability to report government fraud or abuse to the whistleblower

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<sup>166</sup> Mark Landler & Charlie Savage, *Obama Outlines Calibrated Curbs on Phone Spying*, N.Y. TIMES (Jan. 17, 2014), [http://www.nytimes.com/2014/01/18/us/politics/obama-nsa.html?\\_r=0](http://www.nytimes.com/2014/01/18/us/politics/obama-nsa.html?_r=0).

<sup>167</sup> See *supra* Part II.

court. The debate in this country over Snowden's disclosure definitely suggests that the NSA surveillance program is a hotly contested issue. Rather than suffer the problems caused by uncontrolled public disclosures that the Obama Administration now faces, encouraging whistleblowing and having an effective mechanism in place to foster an appropriate environment for whistleblowing are steps toward preventing and addressing frauds and other violations of law while at the same time protecting the government's legitimate need for secrecy when it comes to our national security. The whistleblower court is an effective mechanism and strikes this balance by providing a legitimate means for national security whistleblowers to safely transmit their concerns to the judiciary thereby preventing the leaks of classified information to the press.

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